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UNIVERSITY OF ALBERTA

WOMEN IN THE THEODOSIAN CODE

by

Mathew Stephen Kuefler

A THESIS

SUBMITTED TO THE FACULTY OF GRADUATE STUDIES AND RESEARCH

IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE

OF MASTER OF ARTS

Department of History

Edmonton, Alberta

Fall 1987

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Carole M. Small

Supervisor

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Date. 23rd October 1987

DEDICATION

Mitchello,

contra quem, propter quem, cuius gratia perfeci.

ABSTRACT

The Theodosian Code, the Roman law-code containing the laws of the Christian emperors from Constantine to Theodosius II, together with new laws of various successors which have been included with it, provides excellent evidence for legal life in the fourth and fifth centuries A. D. The Code gives a particularly interesting insight into the legal position of women in this period. Women, as in other historical periods of social disruption, were provided with an opportunity for social and economic advancement by the crises of this era. Perhaps the most important force in improving the position of women was the conversion of Roman society to Christianity, especially the emphasis placed by Christians on the value of the individual. Among the factors which led to the improvement of the status of women were the disappearance of the life-long tutelage of women, the abolition of the rights that accrued to prolific women, and the decline of *patria potestas*. The Theodosian Code is thus a major source for understanding women's position in the late Roman period.

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I. INTRODUCTION

> L'inégalité de droit entre les sexes, l'oppression de la femme et son effacement tendent à disparaître avec le développement de la civilisation. A vrai dire, c'est précisément la condition sociale des femmes qui constitue la meilleure marque pour juger de l'état réel d'une civilisation donnée.[1]

The later Roman empire, the empire as it existed from Constantine to the collapse of the west, 312 to 476, constitutes one of the most exciting periods of history. Long ignored by many historians, either as too "medieval" for classical scholars, or too "classical" for medieval scholars, the period has only recently begun to receive the attention it deserves. Yet, from the eighteenth-century masterpiece which is Gibbon's *The Decline and Fall of the Roman Empire* to the *opus magnum* of today's giant, A. H. M. Jones' *The Later Roman Empire* (written in 1964), republished in 1966 as *The Decline of the Ancient World*, information has surfaced on this fascinating era. With this in mind, I make my own modest contribution to the study of late Roman history.

Bridel's comment above on the importance of studies on the status of women notwithstanding, the area of women's history is also relatively unresearched. Until recently, few historians have been feminist-minded; few feminists likewise have been historically minded. The famous exception to this, Simone de Beauvoir's *Le Deuxième Sexe*, remains a pioneer study of women in history. In contrast, today we have many

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[1]L. Bridel, *La femme et le droit: étude historique sur la condition des femmes* (Paris: F. Pichon, 1880), p. 8.

well-established feminist historians, and two whose recent works border my area of study are Sarah Pomeroy's *Goddesses, Whores, Wives, and Slaves: Women in Classical Antiquity*, and Suzanne Wempel's *Women in Frankish Society*. I relied on both. Unfortunately again, the first ends the "classical era" with the Antonines, and the second begins her study with the barbarian invasions. Countless studies exist exploring women in Christianity, but most present a theological bent. [2] History awaits a comprehensive study into women in the fourth and fifth centuries.

My own thesis began with an idea popular in feminist theories of history: men, during periods of societal calm, have sufficient collective energy to manage the positions of power and still keep women in subjugation, the normal position of women to men in most societies. When society is in crisis, men no longer have this energy and women are able to seize the opportunity to put themselves in a better position relative to men. Societies in crisis, therefore, present the potential for women to secure a much higher position. [3]

The society of the late Roman empire can only be characterized as a world in upheaval, with disastrous situations all around of population decline, economic

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[2]For a list of works on women in Christianity, see my bibliography.

[3]Nineteenth-century historians connected the link between higher status for women and societal crisis by attributing the decline in society to the influence of women, reversing the cause and effect (Guy Fau, *L'émancipation féminine dans la Rome antique* [Paris: Les belles lettres/Confluents, 1978], p. 181).

crisis, alien invasions, social tensions from the change to Christianity, and climatic change. One should, then, be able easily to prove or disprove the hypothesis by examining the status of women in the later Roman empire, watching for signs of improvement. I intend to prove in my thesis that such a change did take place, and that it was the stress on the social, economic, and ideological aspects of society, mentioned above, that allowed for the betterment of the position of women.

The Theodosian Code (together with the fifth-century Novels and the Sirmondian Constitutions) [4] serves as one of the best sources for the study of the later Roman empire. [5] It was only natural that I should use it extensively. Few sources paint such a vivid picture of the late Roman crises, the population decline and labour shortages, the economic depression and inflation, the tensions within the Roman family and between individuals and the state, and the struggle for and attainment of power of Christianity over paganism. In spite of this, the Theodosian Code has been largely ignored by historians, [6] perhaps because of the

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[4] These are almost always considered together, and I keep this unity by including information from the Novels (referred to in the text with the abbreviation "N.") and the Sirmondian Constitutions (referred to in the text with the abbreviation "Sirm.") in this work. The Theodosian Code itself is referred to in the text as "C. Th.". For more information on these see page 18.

[5] "The Theodosian Code is perhaps the outstanding source of information for the political and economic history of the Roman Empire during the 4th and early 5th centuries of our era." (Arthur Schiller, *Roman Law: Mechanisms of Development* [Paris/The Hague/New York: Mouton, 1978], p. 56).

[6] "The historical and legal study of the Theodosianus is as yet in its infancy" (Fritz Schultz, *History of Roman Legal*

changes, and thus difficulty in language and style obvious in late Latin. [7] Luckily, the Code has been recently translated into English by Clyde Pharr, and so is more accessible. Still, the obscurity of many passages can be frustrating, and the translation is far from impeccable.

The question arises as to why a student of history making a social study would use a legal document as a primary source. Two reasons existed for me. First, literary sources for the fourth and fifth centuries are scarce; scarcer still are any written by or about women. Exceptions do exist. Gerontius' *Life of St. Melania the Younger* records a fascinating life; St. Augustine's great love for his mother allows us to know much of her life from his *Confessions*. Most Christian apologists also included treatises on women in general, and the overwhelmingly misogynistic tone to this whole genre of literature is in itself significant. [8] Contemporary historians were perhaps more neutral, but wrote only tidbits on the lives of imperial consorts, sisters, and daughters. Sadly, few actual writings by woman themselves are preserved. [9]

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[6](cont'd) *Science* [Oxford: Clarendon Press, 1967], p. 316). Although written in 1967, the statement is as valid today.
[7]On this subject, Stewart Irwin Oost writes: "Bombast was the order of the day; imperial laws were so full of it that their very meaning was sometimes obscure even to contemporaries, as well as to modern historians." (*Galla Placidia Augusta: A Biographical Essay* [Chicago/London: University of Chicago Press, 1968], p. 19).
[8]For an excellent analysis of this see Rosemary Radford Ruether, "Misogynism and Virginal Feminism and in the Fathers of the Church" in *Religion and Sexism* (New York: Simon and Schuster, 1974).
[9]I was unable to gain access to a publication which contains the writings of four early Christian women, including Egeria

The literary sources are also inadequate for a second reason. Until very recently, most literary sources preserved primarily the thoughts and ideas of the élite classes in society. Those able to learn to read and write were the élite; their ideas are filtered through the élite culture; their interests rest with the élite culture. Of the individual women with whose lives we are at all familiar all are of the imperial or aristocratic classes. [10] Any generalizations made from these sources can only tell us about these classes. Legal sources, contrastingly, extend to all classes of a society. The Theodosian Code tells us almost as much about women in the baking profession, or women who spent their lives in the collection of fish or the herding of swine, as it does the interests of the imperial court or the inheritances due the daughter of a praetor or a decurion. The Theodosian Code is also much less restricted by geographical barriers, and in this it is also preferable to literary sources. For these reasons, literary sources on women in the fourth and fifth centuries can only remain anecdotal, and will be used as such.

A study of the status of women demands some definition. Since all periods of a woman's life are individually

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[9](cont'd) (Eutheria), a pilgrim of the late fourth century, and Eudocia (Athenais), the wife of Theodosius II. The book is: *A Lost Tradition: Women Writers of the Early Church*, ed. by Patricia Wilson-Kastner, G. Ronald Kastner, Ann Millin, and Rosemary Rader (Lanham, MD: University Press of America, 1981).

[10]"History records from her conning-tower only those women who rise above the mass" (Ludwig Friedlaender, *Roman Life and Manners under the Early Empire* [London: ///, 1908-13], p. 267).

significant, so this study will attempt to explore each period of women's lives, from birth to death. Although there is danger of shifting my focus to write a history of children from the Theodosian Code, I will attempt to distinguish carefully between laws dealing with all children, and those dealing only with girls, and restrict myself to the latter.

Moreover, the idea of status needs some clarification. If I hope to explore the betterment or the worsening of the status of women, I must explain how these judgements can be given. All societies have had their own values on what the status of women "should" be, and I cannot dissociate myself from my values on the subject. According to my definition, therefore, any change in the status of women which allows them greater control over the decisions to be made in their lives, or a change which allows them greater freedom, or a change which makes their social or legal position more equal to that of contemporary men, I consider an improvement in the status of women. A worsening of the status of women, inversely, is those changes which take control away from women, or take freedoms away from women, or keep women in a position of subordination to men.

Some introduction is necessary both to the nature of law in Roman society and to the status of women before the period in question, and these form the first part of my thesis, chapters one and two, respectively. The main body of my thesis then examines the laws in the Code as they fit

into the framework of the economic and social changes of the period. These are represented by chapters three, four, and five. Since I believe the ideology of Christianity was the motivation for the majority of laws on women in the Theodosian Code, it is separated from the other changes as having both social origins and social effects. Some laws, significant in their direct promotion of a better status of women, are included in chapter six, separated from the other laws. A conclusion will sum up my findings.

I have been lucky in finding an area so rich in interest yet so little discovered. I hope that *Women in the Theodosian Code* will exhibit this.

II. INTRODUCTION TO THE THEODOSIAN CODE

The complexity of Roman jurisprudence is proverbial. The codex of laws created under the eastern Roman emperor Theodosius II represents an amazing undertaking, and remains one of the most valuable sources of law for the later Roman empire. The largest and most comprehensive compilation of Roman law yet created, its creation was a admirable attempt at establishing a standard for law throughout the Roman empire.

A. The Creation of the Code

On the 26 March, A. D. 429, Theodosius II ordered that a revision of Roman laws be started by compiling all the existing ordinances into sixteen books, which would thenceforth be the sole authority in the Roman law courts.[11] The books would be called by his name, and to ensure their competence, a commission of nine of the most influential men in the eastern empire was established, under the praetorian prefect Antiochus,[12] to oversee the

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[11]"Minutes of the Senate of the City of Rome", in *The Theodosian Code and Novels, and the Sirmondian Constitutions*, trans. by Clyde Pharr, *et al* (New York: Greenwood Press, 1952), p. 3. What role Theodosius had in the Code is unknown. Certainly Ferdinand Lot gives him little: "Morally he was a bigot, utterly devoid of character and so lazy that he did not even read the Imperial Constitutions which have made his name immortal. There is not a single act which was due to his personal initiative in a reign lasting forty-two years (408-450)." (*The End of the Ancient World and the Beginnings of the Middle Ages* [New York: Harper and Row, 1961], p. 201). In fact, he was greatly influenced by his elder sister, Pulcheria, and his wife, Eudocia (Athenais).

[12]A. H. M. Jones attributes the impetus behind the creation of the Theodosian Code to him, "who had earlier in his

compilation.[13] Under each subject title, these nine officers were first to summarize what the classical Roman jurists had said, then to include all Imperial ordinances since the reign of Constantine, even those which had been superseded by later laws. For some unknown reason, this mandate was never completed, so in 435 Theodosius repeated the mandate, and reorganized the commission. He first enlarged the commission to sixteen members,[14] and shortened their task by removing the necessity for including the advice of the classical jurists. This compendium was completed and became effective on the 1 January 439.[15] It is this code which is known as the Theodosian Code.[16]

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[12](cont'd) career been quaestor" (*The Decline of the Ancient World* [London: Longman Press, 1966], p. 184; *Idem*, *The Later Roman Empire* [Oxford: Basil Blackwell, 1964], p. 248). Support in the west seems interestingly enough to have been provided by Galla Placidia, mother and unofficial regent of the western Roman emperor Valentinian III. Her interest in law is well-documented by Oost in *Galla Placidia* and in "Galla Placidia and the Law", *Classical Philology*, LXIII (April, 1968), 114-21. In the latter, he speaks of her influence both on Athaulf and Valentinian III, and claims that "she was responsible for the famous 'law of citations'" (p. 121; see below, page 15). In the former, he writes: "There can be no doubt of her real interest in the law in general and her active participation in the process of legislation." (p. 217). A woman's direct influence in the creation of the Theodosian Code is significant indeed.

[13]Which, according to Jones, consisted of the praetorian prefect, the quaestor, three *magistri scriniorum*, two retired *magistri*, one former *comes consistorianus*, and one practising barrister (Jones, *Empire*, p. 507).

[14]Consisting of seven *comites consistoriani*, seven law officers, and two professors of law (Jones, *Empire*, p. 507).

[15]The Code was published the 15 February 438, and presented to the Senate for ratification on the 25 December 438. (H. F. Jolowicz and Barry Nicholas, *Historical Introduction to the Study of Roman Law* [Cambridge: Cambridge University Press, 1972], pp. 464-5). Valentinian III gave his assent while in Constantinople for his marriage to Eudoxia, daughter of Theodosius II (Oost, *Galla Placidia*, p. 245).

[16]In a recent address at Oxford University, Tony Honoré

B. The Nature of Later Roman Legislation

Many changes had occurred in the forms of Roman law before this time. During the republic, laws had been enacted by assemblies of the Roman people (*comitia centuriata, comitia tributa, concilium plebis*), and took the form of statutes (*leges*), or plebiscites (*plebiscita*), usually on the proposal of a consul, praetor, or tribune. With the changes brought about by the expansion of Rome during the late Republic, a new form of law, the *senatusconsultum* (literally the advice of the Senate) came to acquire the authority of law and became the norm, and the earlier forms disappeared. *Senatusconsulta* were originally decrees of the Senate, although during the Principate the Senate lay under the control of the Emperor and obeyed his wishes, so the *senatusconsultum* became in fact a veiled imperial law. Rarer forms of legislation also existed, including direct enactments of the Emperor (*constitutiones*), edicts of the magistrates (*magistratuum edicta*), and the answers of those knowledgeable in the law, the jurists (*responsa prudentium*).

With the accession of Diocletian and the start of the later Empire, the Dominate, the *constitutiones* became the

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[16](cont'd) suggested that the revised version of the Theodosian Code was never intended for juridical use, but was only meant to be a historical summary of laws. This is hinted at by Carl von Savigny in *The History of the Roman Law during the Middle Ages* (Trans. by E. Cathcart, Westport, CN: Hyperion Press, 1979), who writes, p. 10: "a Judge would indeed have been ill provided for administering the Law, who took the Theodosian Code as his only guide." Still, it and the extant works of the jurists formed the basis of law in western Europe (*Ibid.*).

sole form of legislation.[17] The Christian emperors continued this trend. By the time of the Theodosian Code, the legal principles of the Dominate had become firmly entrenched, and the *constitutiones* continued, in their four forms, as the single mode of legislation. The forms are:

> (1) *Edicta*: orders issued in [the Emperor's] capacity of chief magistrate, which gave them the *ius edicendi*, (2) *Decreta*: judicial decisions of the Emperor, either on hearings in first instance or on appeal, (3) *Rescripta*: answers to questions submitted to the Emperor... (4) *Mandata*: instructions to officials... the commonest form of *constitutiones* were the general laws (*leges generales*) and *rescripta*.[18]

C. The Nature of Late Imperial Rule

Constitutiones, as direct enactments of the emperors, were only successful because the nature of Imperial rule under the Dominate had been altered so dramatically from that of the Principate. From the time of Augustus, the emperor promoted the illusion of being just the *princeps*, or first citizen. The actual power of the emperor required delicate explanation by jurists, but they preserved the pretence.[19] The Dominate, in contrast, took its name from

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[17]D. G. Nowell, *Questions and Answers on Roman Law* (London: Sweet and Maxwell, 1959), pp. 4-7. For more information on Diocletian and the law see Stephen Williams, *Diocletian and the Roman Recovery* (London: B. T. Batsford, 1985), pp. 141-4.

[18]Nowell, *Questions*, p. 5.

[19]In the third century, the jurist Ulpian had written: "What the emperor decides has the force of law, because in the royal law, which is passed about his sovereignty, the people confers upon him all its sovereignty and power". (*Digest. I,iv.I, proem.*; quoted in Jones, *Decline*, p. 121; also *Idem*, *Empire*, p. 322).

the new regard for the emperor as *dominus* (lord), now both in law as in fact.[20] Diocletian, by adopting the extravagant language and customs of the oriental rulers, reminded his subjects daily of this new legal position. The language of the Theodosian Code preserves the outrageous posturing of late Roman officials in references to the emperor.[21] All of this was supported by the official imperial religion of the emperor as God.

The Christian emperors, with modifications, kept the model of government established by Diocletian. No longer could they consider themselves as God, and they thus lost somewhat the supreme obedience of the people,[22] but they replaced this with an official position as vice-gerent of God, his representative on earth. Laws enacted by Christian emperors, then, still gained their authority as emanating from God, even if a bit more indirectly. The authority of the *constitutiones* in the Theodosian Code apparently came still from God.[23]

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[20]On this see André Chastagnol, *L'évolution politique, sociale et économique du monde romain de Dioclétien à Julien* (Paris: Société d'Edition d'Enseignement Supérieur, 1982), p. 66.

[21]See especially the "Minutes of the Senate of the City of Rome" (Pharr, p. 3).

[22]Note the difference between the views of Ulpian, above, and those of St. Ambrose, who in the fourth century wrote: "the emperor enacts laws which he is the first to keep." (*Epist.*, 21.n.9; quoted in Jones, *Decline*, p. 121). In fact, Ambrose had numerous battles with the emperor Theodosius over the discrepancy between the laws of the latter and the laws of God.

[23]"As 'living law' (*nomos empsychos*) the emperor possessed not only the exclusive right to make new laws but also the power to ignore his enactments, revise them, or apply them inconsistently to suit his dynastic advantage." (Kenneth G. Holum, *Theodosian Empresses: Women and Imperial Dominion in*

D. Trends in the Code

The Christian emperors brought many changes to Roman law. Constantine and his successors had the task of collating existing Roman customs with the newly-adopted Christian principles. The transference of the imperial capital to Constantinople and the subsequent greater influence of Greek ideas on Roman culture also had its effect in laws.[24] Adaptations were made. In short, the Christian era in the Roman empire witnessed many broad changes, not the least of which was in law.

One of the most obvious trends in the Theodosian Code was that of simplification. It was only natural that with all the number of legal changes operated by the conversion to Christianity, some confusion would result. Constantine and his successors believed that their new mandate from the Christian God bestowed on them the authority to override traditional Roman laws by their decrees.[25] As a result, their Roman subjects needed to be told which of the former laws should be obeyed, and which could be discarded. In the early empire, jurists had made these kinds of decisions,

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[23](cont'd) *late Antiquity* [Berkeley: University of California Press, 1982], p. 19). This sentiment was stronger in the eastern empire than in the west.

[24]Several examples of areas where changes were brought about by these two influences include: *tutela*, the dowry, the inheritance of property, and the *donatio ante nuptias*. Most of these changes were in private law, and in particular that portion which deals with families (Jolowicz and Nicholas, *Introduction*, pp. 471-2).

[25]Three of the most significant changes are 1) an end to the law against celibacy, 2) penalties for divorce, and 3) the establishment of ecclesiastical courts of law (James Muirhead, *Historical Introduction to the Private Law of Rome* [London: A. and C. Black, 1916], p. 345).

interpreting the statutes and reconciling contradictory laws. In the later empire, however, the institution of jurisprudence had declined, partly due to its natural antipathy to the type of rule of the Dominate,[26] partly because the better minds of the time preferred to enter the imperial bureaucracy or the Christian hierarchy.[27] Individual judges were denied any decisions of interpretation, which is probably indicative of their overall competence.[28] Rather, an elaborate system of ranking gradually evolved in the fourth century, whereby conflicting laws were not reconciled but in which one type of law automatically took precedence over another. Enactments of the emperors were given greater authority than answers of the jurists, naturally. Within the former category, edicts (*leges generales* or *edictales*) superseded rescripts or decrees or mandates.[29] Within the latter, some jurists were

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[26]Whereby the Emperor made all final decisions concerning interpretation of the law, and under which anonymity of the jurists was preferable to enhance the theoretical position of the emperor as font of justice (William Warren Buckland, *A Text-Book of Roman Law from Augustus to Justinian* [Cambridge: Cambridge University Press, 1950], p. 32; Schultz, *History*, p. 264. See also C. Th. 1.2.3).

[27]Buckland, *Text-Book*, pp. 32-3; *Idem*, *A Manual of Roman Private Law* (Cambridge: Cambridge University Press, 1953) p. 19; Schultz, *History*, p. 264.

[28]Muirhead, *Introduction*, p. 354.

[29]In 315, Constantine declared all rescripts conflicting with general laws to be invalid (C. Th. 1.2.2). Valentinian II, Theodosius, and Arcadius in 393 allowed no persons to seek imperial exemption from general laws (C. Th. 1.1.4). Arcadius and Honorius in 398 forbade the taking of precedents from rescripts (C. Th. 1.2.11). Theodosius II and Valentinian III abrogated this in 425, but only allowed precedents from rescripts if specifically stated at the time of their creation (Jolowicz and Nicholas, *Introduction*, p. 461).

discredited, others commended, all were priorized.[30] Simplification rather than sophistication was the key used to end the legal confusion.

The perfect example of this trend to simplification is the infamous "Law of Citations". This law (C. Th. 1.4.3) created in 426 was bemoaned by one historian as "a signal proof of the lamentable condition into which jurisprudence had sunk in the beginning of the fifth century".[31] By this law of Theodosius II and Valentinian III, each of the major jurists was ranked in a strict hierarchy, and any legal debate simply counted the number of jurists on each side, according to their authority.[32] Only in the event of an equal weight on each side was the judge allowed any power of interpretation. This seems rather an ironic end to centuries of legal debate.[33]

Members of the legal profession of the late Roman period were also participants in another trend in legal science, away from general principles or rules toward legislation enacted for a specific purpose or in a specific case. Partly due to the already-noted decline in jurisprudence in this period, the trend from generalization

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[30]In 321, Constantine forbade the use of the notes of Ulpian and Paulus on Papinian (C. Th. 1.4.1). In 327 he commended the use of Paulus' *Sententiae* (C. Th. 1.4.2).

[31]Muirhead, *Introduction*, p. 353.

[32]Papinian was counted as the greatest, followed by Paulus, Gaius, Ulpian, and Modestinus. Papinian's opinion was to be taken above any one of the others, but not above two of the others.

[33]"This was a crude rule but it had at least the merit that a diligent lawyer could say what the law was on most disputed issues." (Jones, *Decline*, p. 181; also *Idem*, *Empire*, p. 471).

to specificity also corresponded to a growing emphasis on individuality in the late Roman (Christian) mind. This trend will be discussed later as it affected women, and its importance in legislation dealing with women is paramount.[34] In the laws of the period, however, it gave birth to a multitude of ad-hoc laws, whose origins were no longer in carefully designed imperial policies but were mere devices to patch up the growing multitude of social problems in the Roman empire of the fourth and fifth centuries.[35] Many of the laws dealing with women can thus be seen as stop-gap solutions to the various economic and social problems of the time.

Seen in this light, the creation of the Theodosian Code was a natural outcome of these trends to simplification and specificity, being as it was the authoritative text of the most important laws, the edicts or general laws.[36]

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[34]See pages 97 to 99.

[35]"In general,... the imperial government was content to tackle problems as they arose, or rather as they were brought to its attention. Its policy was thus influenced by various groups who pressed their grievances or ambitions upon it. By reading between the lines of the Codes, one can to some extent evaluate the influence exercised by various groups." (Jones, *Decline*, p. 135).

[36]Schultz, *History*, p. 289, also mentions these two trends. Worth mentioning also is the fact that the Theodosian Code is part of another, contemporary trend, that of the transference of important written documents from scrolls to codices. (Jolowicz and Nicholas, *Introduction*, p. 455).

E. The Content of the Code

The Theodosian Code attempted to be the comprehensive summary of the laws on all areas of Roman life. Based in form on earlier codes,[37] the Code consisted of the following sixteen books:

Book I: On Governmental Offices

Book II: On Legal Matters

Book III: On Marriage and Familial Affairs

Book IV: On Property

Book V: On Inheritance

Book VI: On Ranks and Titles

Book VII: On Military Matters

Book VIII: On Lower Governmental Offices

Book IX: On Criminal Law

Book X: On Fiscal Law

Book XI: On Taxation

Book XII: On Tax Collection

Book XIII: On Municipal Government

Book XIV: On Municipal Law

Book XV: On Public Works and Services

Book XVI: On Religion

The first five books concern private law, the rest public. Within the books, "titles" are arranged in no

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[37]Namely the *Codex Gregorianus* and the *Codex Hermogenianus*, both unofficial works, no longer preserved. The first contained edicts from Hadrian to Diocletian, the second only edicts for a few years of Diocletian's reign. Both still retained some authority until the sixth century. (Muirhead, *Introduction*, pp. 355-6; see also Jones, *Decline*, p. 184; or Schiller, *Roman Law*, p. 55).

particular order, each title containing the laws in chronological order on a given subject. Also, many of the laws are followed by an *interpretatio*, a summary and clarification of the law added at a later date.[38] To prevent the Code from becoming obsolete, regular additions, called Novels (*novellae constitutiones* or new laws) were made to incorporate the later legislation of Theodosius II and that of his successors. Of the novels, only those of Theodosius II, Valentinian III, Majorian, Marcian, Severus, and Anthemius survive.[39] Most modern editions of the Theodosian Code and Novels contain as well the Sirmondian Constitutions, named after their seventeenth-century publisher, which consist of sixteen edicts on religious matters, most of which appear in abriged form in the main body of the Code. All these have been used for the present study.

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[38]The dating of these insertions is unknown. W. W. Buckland (*The Main Institutions of Roman Private Law* [Cambridge: Cambridge University Press, 1931], p. 33) writes: "The view of Savigny and Mommsen, that the *interpretatio* was prepared for the purposes of the Breviary and thus represents early sixth-century doctrine, is not now dominant. It is widely but not universally thought that though obviously late, it was adopted from an earlier work... and thus represents western doctrine in the later part of the fifth century." In contrast see Jones (*Empire*, p. 239).

[39]Abbreviated in the text as: N. Th., N. Val., N. Maj., N. Marc., N. Sev., and N. Anth., respectively. See also page 3, footnote 4.

F. The Enforcement of the Code

Once the laws in the Theodosian Code were created and promulgated, their affect on the lives of Roman citizens of the fourth and fifth centuries is difficult to assess.[40] Much of that would depend on the quality of law enforcement in general of the period, and sources which mention this are rare. Some information may be gleaned, however.

Theoretically, all citizens had access to Roman justice. The first trial courts were those of the provincial governors, the civil magistrate responsible for all workings in the province. Constantine gave Christian bishops the right to try civil cases as well. Appeals, which were made often, went to the praetorian prefect, to a *defensor civitatis*, or sometimes directly to the emperor himself.[41] Practically, there were many problems in the enforcement of justice. It was slow. It was entrusted to many officials who were ignorant of the law,[42] and who could be persuaded to accept bribes.[43] Not all citizens were treated equally,

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[40]"There is no excuse... for taking the *Codes* at face value. Their ferocious punishments and strident wording bespeak frustration; of another of their weakness, it has been often enough pointed out that laws repeated are laws unenforced" (Ramsay MacMullen, "Social Mobility and the Theodosian Code", *The Journal of Roman Studies*, LIX [1964], p. 49). He adds: "The [Theodosian] *Code* certainly reveals what the emperors intended, but it should be used with great caution by anyone seeking to describe the realities of the times." (p. 53).

[41]"The emperors had a justifiably low opinion of the learning and integrity of the lower courts and gave them very wide latitude to appeals." (Jones, *Decline*, p. 187).

[42]"The administration of justice was the function of magistrates, who normally had other functions, and, even if they were judges only, were not chosen for legal learning." (*Ibid.*, p. 192; see also *Idem*, *Empire*, p. 470).

[43]The system of *suffragio* meant that most officials had paid

humiliores receiving much harsher penalties than *honestiores*.[44] Even the promulgation of the Theodosian Code did not clear up all problems concerning which laws were valid, since some regional differences still occurred.[45]

In addition, though the two halves of the empire were still considered one, each increasingly was taking a different direction. In recognition of this, it was decided that any additions to the Code, in the form of novels, would only apply in the part of the empire in which they were enacted, unless re-enacted in the other part.[46] Conditions being what they were, fewer and fewer novels found their way across the empire. In fact, while thirty-five of the novels of Theodosius II became law in the west, only five of the novels of Marcian did. No novels from the west were promulgated in the east.[47]

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[43](cont'd) great sums of money for their positions, and accepting bribes was one way of recouping the lost capital (*Ibid.*, pp. 391-6; *Idem*, *Decline*, p. 193).

[44]For example, capital punishment meant death to *humiliores*, but to *honestiores* only loss of status and property, and banishment to an island (Charles Henry Coster, *The Iudicium Quinquevirale* [Cambridge, MS: The Medieval Academy of America, 1935], p. 4. See especially Peter Garnsey, *Social Status and Legal Privilege in the Roman Empire* [Oxford: Clarendon Press, 1970] who deals with this subject at great length. See also Jones, *Decline*, p. 198).

[45]As Jones writes: "while a constitution issued by any emperor was in theory issued by the imperial college and valid throughout the empire, laws were in fact normally promulgated only in the area governed by the emperor who issued them. A cunning lawyer could thus confront the court by producing an imperial constitution from another part of the empire." (*Ibid.*, p. 182). Jones adds examples of cases where this happened. Buckland (*Institutions*, p. 21) agrees.

[46]Jones, *Decline.*, p. 126.

[47]*Ibid.*, p. 184; *Idem*, *Empire*, p. 170-1; Muirhead, *Introduction*, p. 358.

G. The History of the Code

Still, after its publication, the Theodosian Code remained the authoritative codification of Roman law for some time. The novels kept it from becoming too obsolete, and after all, it had been a major accomplishment.

In the west, the Code was soon outdated, not because of any defect in itself, but because of the collapse of the Roman government in the west. By 476, the last Western emperor was deposed, and the area once ruled by Romans was ruled by members of various Germanic tribes, each independent of each other and of the eastern empire. Yet the Theodosian Code survived in part in these kingdoms, since legal matters were still important, and the sophistication of Roman jurisprudence, even in decline, still far surpassed what the barbarians could produce. In each of the barbarian kingdoms, therefore, the Theodosian Code remained as the guide and model for jurisprudence.

The kingdom of the Visigoths, one of the earliest established, relied heavily on the Theodosian Code in the creation of its law-code. The *Breviarium Alarician*um (the abridgement of Alaric, a Visigothic king), published in A. D. 506, in fact contains much of Books I to V of the Theodosian Code.[48] Since these books contained the private law, they were much more relevant to the Visigoths than Roman public law. Significantly, the *Breviarium* was also

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[48] Savigny, *History*, p. 11. He adds that the breviary "principally consists either of genuine passages of the Roman law itself, or of a specially compiled interpretation." (*Ibid.*, p. 284).

known as the *Lex Romana Visigothorum*. Until its destruction by the Moors in the early eighth century, therefore, part of the Thedosian Code remained in effect in the Visigothic lands.

In Italy, the various barbarian kingdoms used the Theodosian Code as the foundation of their legal science. The first kingdom of Odoacer tried to preserve much that was Roman, including the laws of Rome.[49] After the Ostrogothic takeover, the Theodosian Code still provided the basis for the legal reform of King Theoderic in the early sixth century, with some transformation.[50] And under the Lombards, ethnic Romans were still entitled to follow the now ancient customs of the Theodosian Code.[51] While this kingdom lasted, the Theodosian Code remained the basis of its laws.[52]

Elsewhere, remnants also remained from the Theodosian Code. The short-lived Burgundian kingdom included excerpts of the Theodosian Code in its miniature law-code, the *Lex Romana Burgundiorum*.[53] The Franks also knew of the Theodosian Code, and used it for their Roman inhabitants.[54]

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[49] *Ibid.*, p. 315.
[50] *Ibid.*, p. 315. Also, "the East Goths having, more than any other German nation, respected and preserved in vigour the institution of Rome." (*Ibid.*, p. 392).
[51] By the laws of King Liutprand (*Ibid.*, p. 107). See also *Ibid.*, pp. 114-5 for extended proof.
[52] The *Codex Utinensis*, a Lombardic work of the late ninth century, is "a commentary on the Breviary of Alaric", in turn based on the Theodosian code (*Ibid.*, p. 401-2). See *Ibid.*, p. 433 for cross references between the Codex Utinensis and the Theodosian Code.
[53] "In particular parts however, the sources are given pure and unchanged" (*Ibid.*, pp. 11-2).
[54] See *Ibid.*, pp. 110-3 for extended proof of this. Gregory of Tours, for instance, mentions the Theodosian Code (*The History of the Franks* IV,46; Penguin Books, trans. by L.

Some have even suggested the survival of the Theodosian Code as a direct influence on Carolingian reformers, some three hundred years later,[55] and beyond.[56] The Theodosian Code thus found its way into the legal traditions of most of western Europe.[57]

In the eastern empire, the Theodosian Code remained the legal authority until the reforms of Justinian in the sixth century. Although not as scholarly, Justinian's *Code* and *Digest* were much more comprehensive.[58] The tradition of the Theodosian Code is therefore short in the east.

The manuscripts of the Theodosian Code were translated down to the sixteenth century, when printing allowed them to be distributed widely.[59] But although most of the Code has

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[54](cont'd) Thorpe [Reading, UK: Cox and Wyman, 1974], p. 241).

[55]In the Decretals it was written: "quod Theodosius statuit imp. et Carolus innovavit." (*Decret. Greg. Cap. 13.X de jud./Lib. ii. Tit.*1; Savigny, *History*, pp. 111-2).

[56]An edict of Charles the Bald (A. D. 864) claims that Roman law in France was never abrogated: "Super illam legem [Romanam] vel contra ipsam legem nec antecessores nostri quodcunque capitulum statuerunt, nec nos aliquid constituimus." (*Ibid.*, p. 161). In fact, Von Savigny claims that until the creation of the *Code Napoléon*, the south of France retained the Roman law (*Ibid.*, p. 160).

[57]This is ironic if Von Savigny is correct when he writes: "The Theodosian Code, although it was universally received as law, had been prepared in Constantinople, and was, principally, intended for the Eastern Empire." (*Ibid.*, p. 69).

[58]Not as scholarly because it did not include obsolete laws for interest's sake, and because it changed the texts of laws in recording them to modernize them. More comprehensive because the Code contained all the laws from the *Codex Gregorianus*, the *Codex Hermogenianus*, and the *Codex Theodosianus*, as well as all those to A. D. 529; the *Digest* included all the responses of the jurists. A collection of Novels by Justinian also included laws to A. D. 565. (Jones, *Decline*, pp. 185-6).

[59]Muirhead, *Introduction*, p. 357. Books VI to VIII were first published by Cujas, Books IX to XVI by Dutillet.

been known to the modern world since the sixteenth century. Books I to V were known only through excerpts in the various barbarian law-codes, especially the *Breviarium Alaricianum*.[60] Only in the early nineteenth century were the missing parts recovered, from a manuscript at Turin, although some estimate large parts of the first five books may still be missing.[61] This is particularly unfortunate for the study of women in the Code, as these books contain the private law of Rome. Still, what remains can tell modern scholars much of the lives of women in the fourth and fifth centuries.

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[60] *Ibid.*, p. 357.
[61] Muirhead (*Ibid.*, pp. 357-8) estimates that one-third is lost. Pharr (p. 11, n. 1) estimates two-thirds.

III. WOMEN IN ROME BEFORE CONSTANTINE

Women in the Roman Empire of the fourth and fifth centuries A. D. were heiresses to, and thus directly affected by, traditions of great antiquity with regard to their legal position. From the dim recollections of Roman pre-history, through the rapid and far-reaching changes of the Republic, to the crystalization of the legal position of women in the Imperial period, women's legal status constantly evolved to correspond with changing social realities.

A. The Earliest Periods

The proverbial mists of antiquity shroud the legal position of women in early Roman times. Most modern scholars agree that the most ancient legal status of women was a near slavery under the tradition of *patria potestas*, the absolute legal power of the eldest living male ancestor (*paterfamilias*) over his descendants, male and female.[62] This power included the right to choose the marriage partner for his descendants, collect all property or money earned by them, and even to sell them into slavery or kill them, definitely at birth and possibly at any age.[63] A relative

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[62]Marxist theory places this hierarchy at the origin of the idea of class. Compare with Marx and Engels (*German Ideology*, 1846) who write: "the nucleus, the first form, of property lies in the family, where wife and children are the slaves of the husband." (Quoted in G. E. M. de Ste. Croix, *The Class Struggle in the Ancient Greek World*, p. 99). Modern works also contain this theme (see Gerda Lerner, *The Creation of Patriarchy* (Oxford: Oxford University Press, 1986).

[63]See especially J. A. Crook, "Patria Potestas", *Classical*

institution to this was that of *manus*, whereby a woman passed into the near *patria potestas* of her husband, her legal position being equal to that of his daughter (*in filiae loco*).[64] For the lower classes, this was done by *coemptio*, the fictitious sale of the woman to her husband.[65] For all practical purposes, women were thus the equivalent of slaves, first to their fathers, then to their husbands.

The exigencies of social reality soon worked to complicate the legal system. While some Roman fathers may once have exposed all their daughters at birth, by the seventh century B. C. fathers were obliged by law to raise at least one of their daughters.[66] Also from early times, the father's traditional right to enslave his children was

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[63](cont'd) *Quarterly* XVII (1967), pp. 113-22. See also *Idem*, *Law and Life of Rome: Aspects of Greek and Roman Life* (London: Thames and Hudson, 1967), p. 99; or Buckland, *Text-Book*, pp. 101-4. On infanticide see J. Balsdon, *Roman Women: Their History and Habits* (London: Bodley Head, 1962), p. 196; Crook, Law and Life, p. 108. For linguistic evidence of these institutions see Mary Johnston, *Roman Life* (Glenview, IL: Scott, Foresman, and Co., 1957, p. 107 for cognates with *pater*, or Judith Hallett, *Fathers and Daughters in Roman Society: Women and the Elite Family* (Princeton: Princeton University Press, 1984), p. 216 for cognates with *mater*, p. 212 for *filia*, p. 221 for *uxor*. For cross-cultural studies of marriage in other Indo-European groups see Percy Elliot Corbett, *The Roman Law of Marriage* (Oxford: Clarendon Press, 1930), p. 69.

[64]*Ibid.*, p. 68.

[65]Although *coemptio* was carefully distinguished from real slavery (Schultz, *Classical Roman Law* [Oxford: Clarendon Press, 1951], p. 116; see also Balsdon, *Roman Women*, p.1 179; or Jerome Carcopino, *Daily Life in Ancient Rome*, trans. by E. O. Lorimar [New Haven, CN: Yale University Press, 1940], p. 80).

[66]From the laws of Romulus. Linguistic evidence comes from the fact that women were known usually by the feminine form of their family name (the *cognomen*), an awkward label if there were usually more than one daughter.

curtailed, and the law provided that a daughter could untie all bonds to a father who had sold her into slavery.[67] In addition, from as early as the fifth century B. C. there is evidence for marriages without *manus*, so that the interests of the blood relatives would not be lost by the marriage.[68] Coemptio was gradually replaced by *usus*, a simple cohabitation that allowed a woman to remain out of the control of her husband by simply being absent from his home for three consecutive nights a year (*trinoctium abesse*). The institution of *tutela* was created to extend *patria potestas*

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[67]This is the same rule as for a grandchild, but a son had to be sold three times to free himself from his father (Schultz, *Classical*, p. 146; Buckland, *Text-Book*, p. 122; Nowell, *Questions*, p. 38).

[68]"Because marriage without *manus* gave the wife some rights to her husband's property, the groom's family would stipulate a marriage arrangement without *manus*. Similarly, when the wife was wealthy, her family was likely to prefer a marriage arrangement without *manus* so that her property remained in her family of birth." (Sarah B. Pomeroy, *Goddesses, Whores, Wives and Slaves: Women in Classical Antiquity* [New York: Schocken, 1975], Wives, and Slaves, p. 155. See also *Idem*, "The Relationship of the Married Woman to Her Blood Relatives in Rome", *Ancient Society* 7 [1976], p. 222. Likewise, see Ste. Croix, *Struggle*, p. 103 for Marxist agreement, and Simone de Beauvoir, *Le Deuxième Sexe* [Paris: Gallimard, 1949], Vol. I, p. 1 for feminist agreement). This idea is much more plausible than traditional views, that marriage without *manus* originated with the Greek influence of humanity (Schultz, *Classical*, p. 103), or that "women rebelled against such servitude" (Balsdon, *Roman Women*, p. 179). Worth considering also, though, is the idea that marriage without *manus* "was probably an attempt to prevent a patrician woman's loss of her class standing in the event that she married a plebeian." (Marilyn Arthur, "'Liberated' Women: The Classical Era", in *Becoming Visible: Women in European History* [Ed. by R. Bridenthal and C. Koonz, Boston: Houghton Mifflin, 1979], p. 80). These ideas make more sense, since, as Crook points out, "non-*manus* marriage was actually unfavourable to the wife, since she would acquire no share in her husband's acquisitions during the marriage." (*Law and Life*, p. 104).

of a woman past the natural life of her father. In addition, the growing power of the state out of necessity encroached upon the traditional powers of the father and husband.[69]

The era of the Republic witnessed the transition of Rome from a rural-based state to a huge urban empire. Such profound changes also can be seen in the social position of women, which developed greater and greater freedom from their original near enslavement. *Usus* without *manus* continued to rise in popularity above *coemptio*. The abolition of the distinction between patricians and plebs in 445 B. C. helped the decline of *confarreatio*, the upper classes' form of *manus* marriage.[70] Divorce became much more frequent, and it became possible for a wife to divorce her husband.[71] In the political turmoil of the Punic Wars, women gradually gained partial rights to administer their own property and possessions. The economic and social upheavals of the Punic Wars have been seen as the cause of the partial liberation of women in ancient Rome.[72] In the last years of

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[69]"C'est de conflit de la famille et de l'Etat qui définit l'histoire de la femme romaine." (Beauvoir, *Deuxième Sexe*, Vol. I, p. 147).

[70]Corbett, *Marriage*, pp. 69, 90; Buckland, *Text-Book*, p. 119; Johnston, *Roman Life*, pp. 127-8. Or as Muirhead (*Introduction*, p. 312) would have it, "So repugnant was such subjection to patrician ladies that they declined to submit to confarreate nuptials". Carcopino (*Daily Life*, p. 83) also points to the existence of private marriages in the late Republic.

[71]Seneca claimed that some women counted the years not by consuls but by husbands (Friedlaender, *Roman Life*, p. 243). On the ease of divorce see Buckland (*Text-Book*, p. 117) who says that "it was open to either party to end the marriage" (see also Michel Humbert, *Le remariage à Rome* [Milan: Dott. A. Guiffré, 1972], p. 113ff).

[72]"Les absences prolongées du *pater* aux armées et l'exploitation d'une territoire conquis de plus en plus

the Republic, many (male) authors bemoaned that increasing social independence of women.[73] It was left to the imperial period of Rome to translate these social realities into legal ones.[74]

B. Women in the Early Empire: Women in the Family

The copious legislation of Augustus, the first Roman emperor, on women, marriage, and the family set up the framework for the legal status of women under the Empire, a framework which lasted for centuries. Augustus also continued to expand the interference of the state in the private lives of its citizens,[75] and thereafter many

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[72](cont'd) lointain, s'opposent à l'exercice effectif d'une autorité patriarcale." (Gaudemet, "Le statut de la femme dans l'Empire romain", *Receuils de la Société Jean Bodin pour l'histoire comparative des institutions: la femme* II [1959], p. 193). See also Pomeroy, *Goddesses*, pp. 170-80, or her "Relationship", p. 222 for this theory. She links the new economic role directly with the rise of marriages without *manus* (see footnote 7). See also Moses I. Finley, "The Silent Women of Rome", *Horizon* VII (1965), p. 61.

[73]"What [women] want is complete freedom - or, not to mince words, complete licence." This statement of Cato the Elder is quoted in Balsdon, *Roman Women* in his section on the subject, pp. 32-7. Or Propertius' "Sooner will the sea be dried up, and the stars reft from Heaven, than our women reformed." (Quoted in Friedlaender, *Roman Life*, p. 241). Cicero also equates equal rights for women with social and natural anarchy (Fau, *L'émancipation*, p. 9).

[74]"Peu à peu la situation légale de la Romaine s'adapte à sa condition pratique." (Beauvoir, *Deuxième Sexe*, Vol. I, p. 149).

[75]This is the main point of Leo Ferrero Raditsa's article, "Augustus' Legislation Concerning Marriage, Procreation, Love Affairs and Adultery", *Aufstieg und Niedergang der Roemischen Welt* II.13 (19//), 278-339. According to Raditsa, Augustus sought to replace familial ties with ties to the emperor (p. 321). This same idea is in Paul Gide, (*Etude sur la condition privée de la femme, dans le droit ancien et moderne et en particulier sur la Sénatus-consulte Velléien, suivi du caractère de la dot en droit romain, et de la condition de l'enfant naturel et de la concubine dans la*

situations previously handled within the family came under the supervision of civil magistrates. In many cases, the winners in the power struggles between the fathers and husbands on the one hand and the emperors and their bureaucracy on the other were the women.

A discussion of women in the Roman empire is by necessity a discussion of women in the family. Women were seldom seen by their contemporaries outside their family roles, as daughters and sisters first, then as wives and mothers.[76] Again, a social truth affects a legal one, and so most of the laws dealing with women deal with them in one of these roles. Of course, the women who did not fit into families, however rare and difficult to document, must also be examined. The primary division, then, is on the one hand in social terms, between women in the family and women outside the family, or on the other hand in legal terms, between women *alieni iuris subiecti* (under *patria potestas* or *manus* of another), and women *sui iuris* (under their own control).

A woman's first role within the family was as daughter.[77] From the moment of birth she stood in relation

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[75](cont'd) *législation romaine* [Paris: Larose et Forcel, 1885], p. 132). Arthur ("'Liberated' Women", p. 79) writes that for Roman women "the transition from republic to empire is great dividing line". (See also Beauvoir, *Deuxième Sexe*, p. 149).

[76]Indeed, "women's political influence and social significance are not merely linked with, but virtually inseparable from their structural centrality in the Roman upper-class family." (Hallett, *Fathers*, p. 31).

[77]In fact, "the Romans gave cultural emphasis to daughterhood, not only in and of itself but also as having priority over other female familial roles" (*Ibid*, p. 213. In

to her father and to her mother. The legal implications of these two relationships will be examined through the daughter's inheritance of status, responsibility for her upbringing and education, her betrothal, and her dowry. In each of these situations, her father wielded all the legal power, even with the limitations placed on his *patria potestas* under the empire.

A daughter inherited her social status through a complex legal arrangement. Women and men naturally followed the social status of their parents. If the parents were of different status, however, but legally married and thus of two classes allowed to intermarry (*conubium*), they followed the status of their father. If either of these two conditions was not fulfilled, they followed the status of their mother. This rule was more complicated in the case of marriage between Roman citizens and resident aliens, or between free and enslaved persons, but in no case was there a difference in status dependant upon the sex of the child.[78] Thus no greater restrictions were put on women in this area than on men in the area of status. Betrothal of a daughter, as of a son, was the father's legal responsibility.[79] Early in the empire, a father was bound to betroth his daughter, and later, he was obliged to find a

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[77](cont'd) chapter three of this work, "Filiae Familiae", Hallett discusses her theory of Rome's 'filiafocality' [her term]).

[78]Corbett, *Marriage*, pp. 24-9; Nowell, *Questions*, p. 41.

[79]Although in actual society, the mother often assisted (J. Phillips, "Roman Mothers and the Lives of Their Adult Daughters", *Helios* n.s. 6, no. 1 [1978], p. 78; Corbett, *Marriage*, p. 61.

man of suitable character for her.[80] The daughter could not legally choose her own fiancé, nor was her approval of her father's choice, even tacitly, necessary for the validity of the betrothal.[81] Once she was betrothed, it is unknown how easily the father could break off the engagement.[82]

The dowry also was the responsibility of the father, and Roman law obliged him to provide an adequate one for his daughter, giving her legal recourse if she was not satisfied.[83] If his daughter married without *manus* (an option chosen by the father) and subsequently divorced her husband, the dowry reverted to the father. A father even kept the right to kill an adulterous daughter in the imperial period, a right lost by his son-in-law, the woman's husband.[84]

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[80]Under Severus and Caracalla (Buckland, *Text-Book*, p. 113; Johnston, *Roman Life*, p. 129; Crook, *Law and Life*, p. 108).

[81]"It has been argued... that until late imperial times, she [a daughter under *potestas*] could be promised and given in marriage against her express will." (Corbett, *Marriage*, p. 2. See also Susan Treggiari, "Consent to Roman Marriage: Some Aspects of Law and Reality", *Classical Views* 26 n.s.i. [1982], pp. 34-44; and G. Matringe, "La puissance paternelle et le mariage des fils et des filles de famille en droit romain", in *Studi in onore E. Volterra* [Milan: , 1971], pp. 191-237).

[82]Corbett (*Marriage*, p. 2) claims that there were no penalties for breach of promise until the influence of Christian beliefs. Balsdon (*Roman Women*, p. 177) and Carcopino (*Daily Life*, p. 97) argue that there were penalties for it from the time of Augustus.

[83]Although actual amounts were never legislated. Was this a law of Augustus or of Severus? Gide (*Etude*, p. 134) and Corbett (*Marriage*, p. 153) believe the former, Raditsa ("Legislation", p. 320) believes the latter.

[84]There were legal restrictions to this right: the father had to kill both guilty parties, and it could only be done if he found them in the act in either his or the husband's house (Pierre Grimal, "La femme à Rome", in *Préhistoire et antiquité*, Vol. I of *Histoire mondiale de la femme* [Paris: Nouvelle Librairie de France, 1965], p. 478; Gaudemet,

The Roman woman usually also stood in a legal relationship to her siblings as sister.[85] If infanticide was practised more commonly on female children than on males, as some believe, the Roman woman while growing up had usually more brothers than sisters.[86] Legal responsibilities between siblings lay in the division of inheritance, in avoidance of incest, and in *tutela* and *curatio* of sisters by brothers and other male relatives.

Originally, a daughter was considered to have received her share of her father's inheritance through her dowry, and so was probably excluded from another share of it at her father's death.[87] Unmarried daughters were perhaps provided for in their father's will, again, in the early empire, with recourse to the magistracy if their father excluded them from his will or if he died intestate. Eventually, however, sisters began claiming a portion of the estate beside their brothers. Sisters became able to inherit from their brothers if the latter died intestate and without children.[88] But intestacy was probably not very common, and since the

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[84](cont'd) "Statut", p. 203; Gide, *Etude*, p. 135; Corbett, *Marriage*, pp. 135-8). The husband had the right only to kill his wife's lover (Raditsa, "Legislation", pp. 312-3).

[85]For a full discussion of this see Hallett, *Fathers*, chapter two, "Sorores Familiae", also for the related social roles (but with no legal implications) of aunt and niece.

[86]Balsdon, *Roman Women*, p. 197; Hallett, *Fathers*, p. 181. But the surviving daughter was perhaps loved more than her brothers by her father. Plutarch believed this (Quoted in Pomeroy, "Relationship", p. 215).

[87]Crook (*Law and Life*, p. 104) is uncertain about this. Much of the confusion arises from the use in the original Latin of the word *filii* which may mean "sons" or "children" (Pomeroy, "Relationship", p. 224). For more detail see page 74, footnote 216.

[88]Gaudemet, "Statut", p. 215; Nowell, *Questions*, p. 104.

passing of the *lex Voconia* in 169 B. C., Romans were not permitted to leave estates worth more than one hundred *secterces* to women in their wills. The *ratio Voconiana* of the early empire reaffirmed this, and added that women could no longer inherit from their intestate fathers. About this time, however, Romans began using the *fideicommissum*, a bequest by the testator made to the male heir on behalf of a third (female) party, as a legal loophole to avoid these restrictions. This circumvented the laws on inheritance so successfully that by the second century A. D., the *lex Voconia* had fallen into disuse.[89]

Incest was punishable originally between second cousins or closer relatives, later only closer than first cousins, and always between direct ancestors and descendants. Under Claudius, the law was changed to allow a paternal uncle (*patruus*) to marry his niece (which Claudius in fact did), but marriage between a maternal uncle (*avunculus*) and his niece was still forbidden. Incest was punishable by death or deportation, but sometimes went unpunished, and the punishment was sometimes only inflicted on the male party.[90]

By *tutela* a woman was provided for, in the event of the death of her *paterfamilias*, with an adult male to perform the administrative and legal tasks she herself could not

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[89]But "the theory that women should not inherit large sums of money survived." (Pomeroy, "Relationship", p. 224. See also *Ibid.*, pp. 222-3; *Idem*, *Goddesses*, p. 163; Gaudemet, "Statut", pp. 215-6; Crook, *Law and Life*, p. 125.

[90]Corbett, *Marriage*, p. 50; Balsdon, *Roman Women*, pp. 174-5.

because of legal incapacity.[91] Traditionally, a woman fell under the tutelage of her closest male relative (*tutela legitima*). Under the empire, however, other forms of tutelage existed: that chosen by the woman herself (*tutela optiva*), that chosen by her father in his will (*tutela testamentaria*), that chosen by the civil magistrates (*tutela a magistratu dativa*), or temporary tutelage for particular tasks (*tutela cessicia*). In fact, the imperial period witnessed the disappearance of the *tutela legitima*, the tutelage of a woman by her brother or uncle, as it was abolished by Claudius.[92] The institution of *tutela* gradually lost much of its significance, as it became impracticable to apply the legal restrictions on women enforceable in theory to their daily lives, especially once the *tutor* was no longer the woman's main heir, i.e., her closest male relative. This also gave women more independence from their families, and sometimes even their own choice of *tutor*, which could only have made them take an active part in the administration of their affairs.[93] During the early empire, then, women were acquiring more and more control of their economic existence.[94] With the prohibition of the *tutela*

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[91]Buckland (*Text-Book*, p. 165) writes that the *tutela* of women "was plainly in the interests of the *tutor*." For lists of the civil actions which women were not entitled to perform, see below, page 52, footnote 162. For information on the *tutela* in general, see Schultz, *Classical*, pp. 166-80; Buckland, *Text-Book*, pp. 143-8; Nowell, *Questions*, pp. 46 -51.

[92]Buckland, *Text-Book*, p. 166.

[93]Gide, *Etude*, pp. 137, 140.

[94]Although some public capacity was still denied them. See Arthur ("'Liberated' Women", p. 80) who writes: "Guardianship... originally restricted a woman's right to

legitima of women, the insitution lost much of its necessity, and legal actions were performed for women by their husbands or temporary *tutores*. Thus the decline of, and changes to *tutela*, when combined with the free marriage of women, gave them a great deal of practical independence.

During the republic, another such institution, *curatio*, had been established as assistance in the maintenance of the affairs of a woman under age twenty-five. In contrast to *tutela*, however, *curatio* was voluntary, although once established, was permanent until the woman reached twenty-five.[95] A woman could have both a *tutor* and a *curator*,[96] and with the decline of the *tutela*, the role of the *curator* grew. The continued need for a man to perform legal duties for each woman belies their complete freedom.

One of the most important social roles Roman women played, at least to contemporaries, was as wives.[97] We have seen how through the Roman tradition of *manus*, the husband-wife role was seen as replacing the father-daughter role.[98] After Augustus' *Lex de maritandis ordinibus*, women

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[94](cont'd) the free disposal of her property, but eventually became the means to insure this right". Schultz (*Classical*, p. 189) even claims that by the time of Nero, the legal difference between a woman with a *tutor* and one without was practically non-existent.

[95]Muirhead, *Introduction*, p. 315.

[96]By a law of Nero. (Schultz, *Classical*, p. 1 89).

[97]In the words of Phillips: "marriage and the roles and responsibilities associated with it would constitute by far the major element in a Roman definition of female adulthood." ("Roman Mothers", p. 70).

[98]Hallett (*Fathers*, p. 126) continues to see in this an emphasis on 'filiafocality': "Romans valued the role of father's daughter enough to utilize it as the appropriate model for that of a dependent wife." (Cf. *in filiae loco*).

who were not married, and between the ages of twenty-five and fifty, were liable to indirect fines through the loss of their inheritance rights except within their immediate families.[99] Much of the imperial legislation dealt with women in their role of wives, and the issues attached to this role: types of marriage, conditions for marriage, adoption of the husband's status, property, gifts between husbands and wives, and divorce.

The three types of Roman *manus* marriage for freepersons, 1) *confarreatio*, 2) *coemptio*, and 3) *usus*, had, by the time of the empire, lost much of their significance. The marriage without *manus* had become the norm.[100] *Confarreatio* had lost much of its importance with the abolition of the distinction between patricians and plebs, but was retained for the marriages of high religious officials.[101] Similarly, *coemptio* declined as the lower classes' form of *manus* marriage, and was obsolete by the second century A. D.[102] Usus, without *manus*, became the

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[99]Unmarried men between the ages of twenty-five and sixty were liable to the same penalties. (Corbett, *Marriage*, p. 120; Nowell, *Questions*, pp. 87-8; Balsdon, *Roman Women*, p. 76).

[100]Did this happen as early as the third century B. C., as Balsdon (*Roman Women*, p. 180) maintains?

[101]Notably the *flamin dialis*. By the time of Tiberius, however, the *manus* marriage had become so rare that the office had remained vacant for seventy-five years (87 to 12 B. C.). Tiberius legislated, therefore, in order to encourage marriages by *confarreatio*, that the husband's control of the wife (the *manus*) would only apply to the couple's religious duties, and not to the whole of the marriage. (Balsdon, *Roman Women*, p. 180; Corbett, *Marriage*, p. 78; Schultz, *Classical*, p. 116.

[102]Corbett, *Marriage*, p. 84.

usual form of marriage for all Romans.[103] Again, the decision to avoid *manus* marriages, originally made by the couple's blood relatives to protect their financial interests, was, by allowing the woman to live apart from the male who had legal control over her, responsible for much of the practical freedom enjoyed by women in this period.[104]

Those prohibited from proper marriage practised either concubinage or *contubernium*, legally inferior to proper marriage. What distinguished *usus*, or simple cohabitation, from concubinage, was debated.[105] Nevertheless, concubinage was generally practised between persons who could not marry, rather than those who did not want to marry, usually between men of higher rank and women of lower rank.[106] Concubinage, unlike marriage, had no juridical consequences for the couple (but a major one, illegitimacy, for the offspring); in particular, it did not involve the donation of a

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[103]After Augustus it was impossible for *usus* to contain *manus* (Schultz, *Classical*, p. 117; Corbett, *Marriage*, p. 90).

[104]Gaudemet ("Statut", p. 202) writes that in the marriage without *manus* "le mari n'a aucun droit sur sa femme et les deux époux vivent en pleine égalité et pleine independance."

[105]According to Ulpian, it was merely the presence or absence of *affectio maritalis*, the desire to be [considered] married (Grimal, "Femme", p. 477; Johnston, *Roman Life*, p. 132; Crook, *Law and Life*, p. 100). In more practicable terms, it was often the presence or absence of a dowry (Buckland, *Text-Book*, p.///).

[106]Rawson ("Roman Concubinage and Other *De Facto* Marriages", *Transactions and Proceedings of the American Philological Association* 104 [1974]) found a "total absence of evidence for two freeborn partners choosing *de facto* rather than legal marriage", suggesting that concubinage was not a method of escaping the legal consequences of marriage but was generally the only available form of cohabitation for those involved.

dowry.[107] In spite of this, concubinage was generally unfavourable to the woman, as she received no legal benefits from the relationship.[108] *Contubernium* was not a legally recognized form of marriage, and was generally practised between slaves or in mixed marriages between slaves and freedpersons.[109] Thus for the lowest classes of Roman society, marriage had little legal benefit.

There were generally six conditions for a valid civil marriage (*justae nuptiae*). First, the two parties had to be capable of intermarriage, that is, not too closely related of and not of too differing social classes.[110] Second, both had to be old enough to consummate the marriage, although actual ages were not specified until much later. Third, consent of any parties *sui iuris* to live as married persons (*affectio maritalis*) must be present. Fourth, consent of the *paterfamilias* for those in *patria potestas* must be given. Fifth, the wife (but not the husband) must be present on the day of marriage, when she was usually escorted to her husband's house (*ductio in domum*). Sixth, both parties had

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[107]Buckland, *Text-Book*, p. 128; Balsdon, *Roman Women*, p. 182. Concubinage is defined by Grimal ("Femme", p. 455) as "mariages sans conséquences juridiques".

[108]Raditsa, "Legislation", p. 315. In spite of this, the rate of concubinage seems to have risen in the early empire, probably due to Augustus' restrictions on marriage (Schultz, *Classical*, p. 137).

[109]See Susan Treggiari, "'Libertine' Ladies", *Classical World* 64 (February, 1971), p. 198; also Pomeroy, *Goddesses*, p. 193.

[110]A woman could also not marry her *tutor* or *curator* or one of their sons or grandsons (by a law of Marcus and Commodus). She could also not marry a soldier or a provincial officer (the latter was rescinded under Septimius Severus). Nor could she marry an ex-slave, unless she was one herself (Corbett, *Marriage*, pp. 175, 233).

to have *conubium*, that is, the right to enter into a valid civil law marriage, a right accorded to all citizens and some aliens. If the husband lacked *conubium*, the marriage was called *matrimonium non justum*, and if the wife did not have *conubium*, there could be no marriage.[111] Modestinus in the third century A. D. defined marriage as "the union and life-long partnership of husband and wife, and the sharing of divine and human rights".[112] This definition represents a long progress in the theory of Roman marriage from its origins of women as chattel (by *coemptio*) or as daughter-figures.

The adoption of the husband's status by the woman was an important consideration in Roman marriage. By a *manus* marriage, the woman had legally become a member of her husband's family, and so received his status.[113] In free marriages, the woman remained in her family of birth, and so in marriages between classes did not change her status.[114] Too great a leap in the woman's status, however, was prevented through legislation: marriage between free and

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[111]For lists of these conditions see: Buckland, *Text-Book*, pp. 112-6; Nowell, *Questions*, pp. 39-41; Balsdon, *Roman Women*, pp. 174-6; Schultz, *Classical*, pp. 112-3. The idea of *conubium* of course lost most of its significance after A. D. 212, when Caracalla extended Roman citizenship to all free persons in the empire. Note that the consent of a female slave freed expressly to marry her ex-master was not legally necessary (Buck land, *Text-Book*, p. 113; Johnston, *Roman Life*, p. 132.

[112]Quoted in Gaudemet, "Statut", p. 205.

[113]A wife could not change status from *libertina* (freedwoman) to *ingenua* (freewoman), however (Corbett, *Marriage*, p. 112).

[114]Exceptions were made for the wives of senators, and perhaps of knights also (Schultz, *Classical*, p. 115; Pomeroy, *Goddesses*, p. 182).

enslaved persons was forbidden,[115] marriage between senators and freedpersons was likewise forbidden.[116] Generally, it seems improvements in status were unlikely for women through marriage.[117]

The exchange and administration of the wife's property was an important economic part of Roman marriage. In *manus* marriages, all the wife's property had gone to her husband, or to his *paterfamilias*.[118] In marriages without *manus*, the situation was more complex. The dowry was controlled by the husband, but not owned by him, since it had to be accounted for at the end of the marriage.[119] Augustus forbade the husband to sell any lands within Italy which were part of the dowry, since presumably these were ancient family holdings (*lex de fundo dotalis*).[120] Gifts between husband and wife were generally forbidden, unless they were of a reasonable nature and given on a suitable occasion.[121]

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[115]And sexual relations between a free woman and a male slave (but not vice versa) were punishable by death (Fau, *L'émancipation*, p. 39. Exceptions were made for freewomen and enslaved men, if the latter were of the Imperial household. After A. D. 52 the offspring of these relationships were slaves (Pomeroy, *Goddesses*, p. 196).

[116]A law of Marcus and Commodus (Corbett, *Marriage*, p. 8; Grimal, "Femme", p. 456; Pomeroy, *Goddesses*, p. 195). The latter author claims the law was never entirely enforced.

[117]Indirect improvements might be made, since married men were more likely to be promoted to public office than bachelors (Corbett, *Marriage*, p. 107).

[118]*Ibid.*, p. 148.

[119]Friedlaender (*Roman Life*, p. 236) writes: "the legalization of women's proprietorship in their dower was their final emancipation." See also Gaudemet, "Statut", p. 219; Schultz, *Classical*, p. 124.

[120]Fau, *L'émancipation*, p. 196; Corbett, *Marriage*, p. 180; Gaudemet, "Statut", p. 218; Schultz, *Classical*, p. 124.

[121]A law of Augustus, which survived until Septimius Severus and Caracalla (Corbett, *Marriage*, pp. 114-6; Schultz, *Classical*, p. 121; Balsdon, *Roman Women*, pp. 177-8; Nowell,

Because marriage was initiated by a mere desire to be married (*affectio maritalis*), marriage could be ended by the mere ending of that desire.[122] Originally, marriage could only be ended by death, capture, enslavement, or exile of either of the parties, or by military enlistment on the part of the husband, or by adultery on the part of the wife.[123] In a *manus* marriage, only the husband, or his *paterfamilias*, had been able to end the marriage.[124] In a marriage without *manus*, either party could file for divorce, or either of the *patresfamilias*.[125] In the second century A. D. this was changed, and a father was not allowed to end a marriage which the married parties did not want ended.[126] Under the empire, both parties had the right legally to divorce the other, except in the case of adultery: a woman could not divorce her husband for it, but he could her.[127] In fact,

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[121](cont'd) *Questions*, p. 43; Gide, *Etude*, p. 143.

[122]Raditsa, "Legislation", p. 307. All marriages were dissoluble except that of the *flamines dialis*, which was only so after Domitian (Corbett, *Marriage*, pp. 220-1).

[123]After Alexander, exile did not end marriage. After A. D. 229, military officers could marry, and by the fourth century, soldiers were marrying (Corbett, *Marriage*, pp. 211-3, 217).

[124]And only for just cause (Johnston, *Roman Life*, p. 110). This was done by the same process by which a father would emancipate his daughter from the family (Buckland, *Text-Book*, p. 121. See also Carcopino, *Daily Life*, p. 95; Balsdon, *Roman Women*, p. 216; Corbett, *Marriage*, pp. 10, 222).

[125]The woman could only divorce her husband if she was *sui iuris* (Carcopino, *Daily Life*, p. 96). The first example of this is from 50 B. C. (Grimal, "Femme", p. 446. See also Crook, *Law and Life*, p. 104; Gaudemet, "Statut", p. 208).

[126]For a discussion of this question see especially Gaudemet, "Statut", p. 209.

[127]If his action had been with a married woman, however, he was liable to exile and the loss of half his property (Balsdon, *Roman Women*, p. 77). After Severus and Caracalla this law was extended to fiancés also (Corbett, *Marriage*,

Augustus made it mandatory by the *lex Julia de adulteriis* for either the husband or the father to start proceedings against an adulterous wife, or they could be charged with living off the avails of prostitution. If they failed to bring the matter before the courts within sixty working days of the offence, any other citizen might.[128] In the case of adultery, punishment for the woman was exile to an island, as well as the dissolution of her marriage and the loss of half her dowry, with additional parts for the maintenance of the children.[129] In all other cases, seven-eighths of the dowry must be returned to the woman or to her father. The ease with which divorce might be granted meant that a woman whose father had died and who was divorced only had her *tutor* who had control over her, and as we have seen, in many cases the part played by these men was small. Thus the freedom of women in the early empire was linked to the ease with which they could divorce their husbands.[130]

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[127](cont'd) pp. 16, 141). Socially, the dichotomy may not have been so great, and there are examples of Roman males speaking out against the infidelity of husbands (Ste. Croix, *Struggle*, p. 109. See, for example Ulpian's comments, quoted in Jones, *Empire*, p. 973).

[128]Hallett (*Fathers*, p. 237) writes: "up until the passage of Augustus' *Lex Julia de Adulteriis Coercendis* in 18 B. C., a Roman wife's infidelity does not appear to have been viewed as a particularly grave offense." (See also Balsdon, *Roman Women*, pp. 77, 218; Gide, *Etude*, p. 135; Raditsa, "Legislation", pp. 311-2; Corbett, *Marriage*, p. 144).

[129]Part could also be kept back as compensation for the ex-wife's extravagance, or her misconduct, or for the value of gifts given her during the marriage (See Carcopino, *Daily Life*, pp. 97-8; Schultz, *Classical*, p. 128). "Historical sources suggest that the *Lex Julia* was irregularly applied" (Hallett, *Fathers*, p. 239).

[130]Freedwomen who had married their ex-masters were allowed to divorce them freely, but could not remarry without the latter's consent (Raditsa, Legislation, pp. 328-9; Balsdon,

As mothers, Roman women were also given much cultural significance. Considering the young age at which most Roman women were married, they spent most of their lives as mothers, and unlike their role as wives, their motherhood could not be ended so easily.[131] It is important, then, to study the legal ramifications of this aspect of a Roman woman's life, under the following headings: status for children, rights of a mother over her children, rights of children over their mother, inheritance by and between mother and children, and, most importantly, how having children affected the legal status of women.

Children followed the status of their parents; in the case of children of mixed marriages, the question of status was not a simple one. As mentioned above, if the parents were legally able to marry (*conubium*), and were in fact married (*justae nuptiae*), the children followed the status of the father, since they would be legally in his family and under his *potestas*. If the parents did not have *conubium* and/or were not married, the children took the status of their mother. If an alien man married a Roman woman (*matrimonium non justum*), the children were legitimate, but not under the *patria potestas* of their father. A Roman man could not marry an alien woman, so any children of the two were illegitimate.[132] If a freewoman cohabited with a slave,

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[130](cont'd) *Roman Women*, p. 231).
[131]See Phillips, "Roman Mothers".
[132]Were children of a marriage between freedpersons and persons of senatorial rank illegitimate also? (Raditsa, "Legislation", p. 281). As to the differentiation between the sexes in determination of legitimacy, Corbett (*Marriage*,

her children became slaves, and after Claudius, she herself could be enslaved.[133] The children of a union between two slaves belonged to their mother's master.[134] The mother's legal status was very important, therefore, in determining the status of her children.

A mother had no legal rights over her children. If her husband died while the children were still minors, so that a legal guardian (*tutor*) had to be appointed for them, this guardian had to be male and so she was excluded from the *tutela*, nor could she appoint the *tutor*.[135] In a non-*manus* marriage she was not even legally related to her children, they being part of her husband's family, while she remained part of her father's family. Sons, in contrast, might have some legal rights over their mothers. They might be required to act as her legal guardian if adults and either appointed by their father's will (*tutor testamentarius*), or, until Claudius, as their mother's closest male relative in a *manus* marriage (*tutor legitimus*).

Laws of inheritance by and between mothers and their children were also quite complicated. In a *manus* marriage, a widow received the same share of her husband's inheritance as did the rest of her children.[136] If she died, she could

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[132](cont'd) p. 102) writes: "The reasons for the difference is not far to seek. In a patriarchal society with any desire to conserve its racial purity, exogamy is more easily permitted for women than for men."
[133]Buckland, *Text-Book*, p. 70; Nowell, *Questions*, p. 21.
[134]Pomeroy, *Goddesses*, p. 193.
[135]Schultz, *Classical*, pp. 163, 166.
[136]*Ibid.*, p. 119; Crook, *Law and Life*, p. 119; Balsdon, *Roman Women*, p. 222; Johnston, *Roman Life*, p. 109.

own no property so had nothing to pass onto her children. In a marriage without *manus*, a widow might receive nothing, unless specified by her husband's will, since the return of her dowry was considered to be enough for her maintenance.[137] If she died, her dowry had to revert by law to her blood relatives from which her children were excluded.[138] The imperial period, however, witnessed changes to this. After Hadrian (*senatusconsultum Tertullianum*), a mother could inherit from her children,[139] and in the second century A. D., the *senatusconsultum Orfitianum* allowed women to leave their dowries as an inheritance to their children.[140] Marcus Aurelius even allowed women to leave their estates to their illegitimate children.[141] Even in their role as mothers, women gained greater legal freedom in the imperial period.

Whether or not a woman had children could also directly affect her legal status. We have seen how freewomen who cohabited with slaves and bore their children were themselves liable to the loss of status and even enslavement.[142] This was certainly the most serious change

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[137]Schultz, *Classical*, pp. 119-20; Crook, *Law and Life*, p. 119.
[138]*Ibid.*; Corbett, *Marriage*, p. 120; Nowell, *Questions*, p. 106.
[139]Gaudemet, "Statut", p. 216; Crook, *Law and Life*, p. 119; Gide, *Etude*, p. 145; Carcopino, *Daily Life*, p. 76.
[140]Corbett, *Marriage*, p. 120; Pomeroy, *Goddesses*, p. 161; Nowell, *Questions*, p. 106; Gaudemet, "Statut", p. 216; Gide, *Etude*, pp. 140-1; Humbert, *Remariage*, p. 246ff for complexities of inheritance in cases of remarriage.
[141]Carcopino, *Daily Life*, p. 76.
[142]This was the *senatusconsultum Claudianum* of A. D. 52, by which a freewoman who cohabited with a slave was made a slave herself, if it had been done without the consent of

in a woman's status because of her children. But others existed. From Augustus onward, persons of either sex without children (*orbi*) were liable to indirect fines in the form of the loss of their right to half of their inheritances.[143] After Septimius Severus, abortion was punishable as a criminal offense.[144] Conversely, Augustus offered benefits to women with several children. By *ius liberorum*, a free Roman woman with three or more children, or a freedwoman with four or more children, were exempted from obligatory tutelage. These women were freely allowed to administer their own property and money.[145] Some slave women were even given their freedom if they bore more than three children.[146] Thus, a woman's role as mother was as legally significant as it was socially significant.

C. Women in the Early Empire: Women Outside the Family

Despite the fact that (male) Romans saw their women only in relation to men, only in the family, there were those women who did not fit into these patterns. Legally, these women who were under their own control (*sui iuris*)

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[142](cont'd) the master, but if with his consent, she was made a *libertina* (Balsdon, *Roman Women*, p. 234). If the woman was *alieni iuris subiecti* she could not be enslaved, as she was not her own person (Buckland, *Text-Book*, pp. 68-70). Hadrian abolished this (*Ibid.*).

[143]Nowell, *Questions*, pp. 87-8; Corbett, *Marriage*, p. 121. After Caracalla these appropriated fines became part of the imperial treasury (Raditsa, "Legislation", p. 325).

[144]Balsdon, *Roman Women*, p. 193.

[145]Outside Rome, *ius liberorum* came with four children, and in the provinces, with five. Men earned *ius liberorum* in the same way, which allowed them a greater chance at public office (Balsdon, *Roman Women*, p. 202).

[146]*Ibid.*, p. 230.

included widows, divorcees, religious women, and other unmarried women. As well, in examining independent women, we will have to look at the independent activities of women, including women in the law courts, and occupations open to women.

Widows were a segment of the Roman population *sui iuris*. Because of the the high rate of death in childbearing, most women proably died before their husbands.[147] Augustus, concerned at the plummeting birth-rate among the Romans, ordered that all widows in the upper classes had to remarry within one year of the death of their previous husbands, later (A. D. 9) within two years, or again face the indirect penalties of loss of their inheritance rights.[148] This probably succeeded in reducing the number of widows considerably, and gradually replaced the social respectability of women who only married once (*univirae*).[149] Divorcees were almost certainly greater in number. The ease with which a woman could divorce her husband, and the desirability of divorce if a woman had *ius liberorum* and so could be economically independent, may have

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[147] Pomeroy, *Goddesses*, pp. 164, 169; Balsdon, *Roman Women*, p. 195.

[148] Humbert, *Remariage*, p. 138ff; Balsdon, *Roman Women*, pp. 76-7. Widows were not allowed to remarry before a year had passed from their previous husband's death to ensure that they were not pregnant, which gave them one year in which to marry (Corbett, *Marriage*, p. 249). A widower was worse off, having to marry immediately after his wife's death to escape Augustus' fines (*Ibid.*, p. 250).

[149] See Humbert, *Remariage*, p. 59ff ("L'éloge du mariage unique") or p. 76ff ("La fréquence des remariages"). See also Pomeroy, *Goddesses*, p. 161.

incited many women to want to be divorcees.[150] Since divorcees were liable to the same loss of inheritance as unmarried women if they did not remarry within six months, later eighteen months, this may have prevented some from actualizing their desire, but other women seeking independence might have married several times, enjoying their personal and financial independence between husbands.[151] A divorcee also seldom had to raise her children, since custody usually went to the father.[152] Moreover, since a woman's first husband was still probably chosen by her father, she could divorce this one and choose her own at greater leisure, seeking the qualities she desired in a husband for her second.[153]

Some women were denied marriage altogether as religious women. Notable among these were the Vestal Virgins, who, consecrated as young girls by their fathers, passed out of his *patria potestas*. The Vestal Virgins were legally obliged to remain virgins, facing the death penalty for breach of this obligation.[154] Other cults also gave women temporary

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[150]In fact, the divorce rate dropped considerably from the late Republic to the early Empire (Schultz, *Classical*, p. 133; Balsdon, *Roman Women*, p. 60. Crook *Law and Life*, p. 106) attributes this to the demise of political factionism.

[151]Humbert, *Remariage*, p. 76ff ("La fréquence des remariages") for the laws of Augustus; also Balsdon, *Roman Women*, pp. 76-7.

[152]*Ibid*., p. 219; Pomeroy, *Goddesses*, p. 158. Antoninus Pius allowed a woman to take custody of her children if their father did not look after them properly, and if she had the consent of the children's guardian (Schultz, *Classical*, p. 160).

[153]Fau, *L'émancipation*, pp. 31-3; Crook, *Law and Life*, p. 104; Pomeroy, *Goddesses*, p. 152.

[154]On the status of Vestal virgins see: Buckland, *Text-Book*,

independence, including the traditional Roman worship of the Good Goddess (*Bona Dea*) open only to women, later linked with the goddess Ceres, and the cult of Isis, which demanded sexual continence of its devotées, and rewarded them with ideas of the equality of women and men.[155]

Finally, there must have been some women who, facing perhaps the anger of their fathers and the sanctions of the state, chose never to marry or become concubines without consecrating themselves to the religious life. These women were liable to fines throughout the early imperial period.[156] Nothing is really known of these women, since eventually they simply dropped out of the Roman *Weltanschauung*, and so do not figure in the documents. Many of these women were probably from the lower classes, where the fabric of Roman society was not woven so tightly,[157] and some of them took up various professions. Women of certain occupations were in fact forbidden to marry by Augustus,

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[154](cont'd) pp. 130-1), Balsdon (*Roman Women*, pp. 235-43), Fau (*L'émancipation*, p. 33), or Pomeroy (*Goddesses*, pp. 210-4).

[155]Finley, "Silent Women", pp. 62-4; Fau, *L'émancipation*, pp. 41-2; Pomeroy, *Goddesses*, pp. 216-25; Balsdon, *Roman Women*, pp. 246-7; Friedlaender, *Roman Life*, pp. 255-6.

[156]"To what extent women of good social class deliberately avoided marriage, we cannot say" (Balsdon, *Roman Women*, p. 192). Men who wished to avoid marriage could become betrothed, then break off the betrothal, with a series of prepubescent girls, risking the penalties for breach of promise, but women could not do the same with boys (Pomeroy, *Goddesses*, p. 116; Corbett, *Marriage*, p. 16). There were of course marriages in name only, and these probably left a woman with a great deal of freedom (Friedlaender, *Roman Life*, p. 238; Grimal, "Femme", p. 455).

[157]"It would probably be a safe guess that women of the lower classes were therefore more 'emancipated', more equal *de facto* if not in strict law, more accepted as persons in their own right" (Finley, "Silent Women", p. 63).

including prostitutes, ex-prostitutes, procuresses, and actresses, as well as women formerly guilty of criminal offences or adultery.[158] Unmarried women who engaged in sexual activity could be prosecuted for fornication (*stuprum*), unless they registered themselves as prostitutes. This happened more frequently than the lawmakers desired, and later Tiberius forbade women of senatorial or equestrian rank to become prostitutes.[159]

Upper-class Romans, with their substantial property holdings, probably had to face quite a few legal proceedings. Proceedings for women under *patria potestas* were entirely handled by their *patresfamilias*. Women in *tutela* were legally capable of most simple legal proceedings, but for certain, more complex legal actions, their guardian's assistance was required by law.[160] But women who had *ius liberorum* were granted the privilege of defending their own interests in the law courts.[161] But women were still denied some legal actions.[162] With the

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[158]Balsdon, *Roman Women*, p. 229. Once women were remarried, they could not be accused of a previous adultery, though they could be during the betrothal, by a rescript of Severus (Friedlaender, *Roman Life*, p. 232).

[159]Pomeroy, *Goddesses*, p. 160.

[160]For example, before Hadrian, married women needed to have their guardian present to draft a will (Carcopino, *Daily Life*, p. 84). For other examples see Pomeroy, *Goddesses*, p. 151.

[161]Juvenal wrote of women who had pleaded on their own behalf in court (Friedlaender, *Roman Life*, p. 249). And Crook (*Law and Life*, p. 115) writes of one example where a woman, in the absence of her fiancé, battled in court herself for the rightful disposition of her father's will. See also Grimal, "Femme", p. 450.

[162]The precise list of these actions is disputed by scholars. See especially Gaudemet, "Statut", pp. 211-3. See also Balsdon, *Roman Women*, p. 282; Buckland, *Text-Book*, p.

decline of the institution of *tutela* and the liberal granting of *ius liberorum*, the imperial period saw a gradual rise in women's legal independence, but they were still only allowed to participate in judicial proceedings if they were directly involved in the suit, and never on behalf of a third party, by the *senatusconsultum Velleianum*. This law of Claudius thus prevented women from ever really being equal in legal proceedings with men.[163]

Women who were personally independent needed financial independence. Women of the upper classes had dowries and other inheritances substantial enough to support themselves; those of the lower classes needed to work for their survival. These women worked as prostitutes and their procuresses, tavern-keepers and waitresses, market-sellers and other small businesswomen. Women dominated the wool and laundry industries. There are examples of female physicians and orators, of women in commerce and in real estate, and even the female equivalent of gladiators.[164] Most of these occupations involved a drop in reputation: such was the price paid for personal independence among the lower classes. There were also occupations forbidden by law to women, including banking, work in the corporations, or any public office.[165] Regarding this last occupation, there are

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[162](cont'd) 167; Crook, *Law and Life*, p. 115.
[163]Gide (*Etude*) examines this law in detail. See also Gaudemet, "Statut", pp. 212-4.
[164]Raditsa, "Legislation", p. 314; Pomeroy, *Goddesses*, pp. 175, 200; Grimal, "Femme", p. 476; Fau, *L'émancipation*, pp. 29-30; Carcopino, *Daily Life*, p. 92.
[165]Fau, *L'émancipation*, p. 26; Gaudemet, "Statut", p. 215.

exceptions, because for a while under Elagabalus there was instituted a woman's senate, revived under Aurelian, although its exact nature is uncertain.[166] Elagabalus also promoted two women to the consulship.[167] The practical and legal freedom is well evidenced in the variety of occupations filled by Roman women.

As has been stated, the status of women during the republic was characterized by social realties gradually transforming custom. Conversely, the status of women in the empire was the result of deliberate imperial policy. The legal position of women was set out by Rome's first emperor, Augustus, and was not changed except in minor ways through the rest of the early empire. Not until the conversion of the empire to Christianity were such major changes made again.

Augustus legislated throughout his reign on women, making numerous changes to their legal position. Most important are his *lex Julia de maritandis ordinibus* of 18 B. C., his *lex Julia de adulteriis* of 17 B. C., and his *lex Papia Poppaea* of A. D. 9.[168]

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[166]Balsdon, *Roman Women*, p. 160. See Fau (*L'émancipation*, p. 18) who writes: "Nous sommes mal informés sur leur nombre et leurs activités, mais leur existence même, dans un régime si hostile au droit d'association, doit être considerée comme une conquête du féminisme." In contrast see Pomeroy (*Goddesses*, p. 182) who doubts the existence of the body.

[167]His mother and the mother of his favourite (Friedlaender, *Roman Life*, p. 239). Although the latter position may have been only honorific, the former, given the personality of Julia Soaemias, was definitely not.

[168]For a list of Augustus' significant laws see Gide (Etude sur la condition, pp. 135-6). The *leges Juliae* may have been promulgated ten years earlier, but revoked until Augustus felt more sure of his power (Raditsa, "Legislation", pp.

Augustus' laws established the pattern for women's lives for the rest of the Principate. A few of the *lacunae* and the impracticable details had to be corrected by his immediate successors, Tiberius and Claudius.[169] Later, a few changes in social conditions necessitated changes in some of the laws. Hadrian and Septimius Severus stand out in this regard. But for three centuries the legal design remained basically unchanged. Perhaps social reality had made a few laws obsolete, but even Diocletian, who transformed the entire political nature of the empire, and who was a prolific lawmaker, did not see fit to make any great changes to the status of women. But with the adoption of Christianity, social change overran established social custom, and a new Augustus, by the name of Constantine, and his successors, sought to establish a new pattern of laws for women and their new place in society.

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[168](cont'd) 295-302). This testifies to their significance in his mind. Augustus attempted through his laws not only to increase Rome's birth-rate (Schultz, *Classical*, p. 107; Balsdon, *Roman Women*, p. 75) but also to alter the pattern of upper-class marriages away from the extended aristocratic alliances which had led to the demise of the republic (Arthur, "'Liberated' Women", p. 82; Raditsa, "Legislation", p. 290).

[169]The most significant law of this period on women is the *senatusconsultum Claudianum* (see page 46, note 142).

IV. THE THEODOSIAN CODE AND THE ECONOMIC POSITION OF LATE ROMAN WOMEN

The Theodosian Code contains probably the most useful information which we still possess today on the economic life of the late Roman Empire. The picture which it paints, however, is a distressing one. The economic problems of the fourth and fifth centuries were numerous, and few laws contained in the Code fail to exhibit this. The two broadest and most marked trends of the period, the labour shortage and the depression in wealth, had remarkable effects on the status of women.

A. The Labour Shortage and Women

The labour shortages of the later Roman Empire were one of the most overpowering of its problems. The Roman population, in decline since the third century, and beset by continual invasions, plagues, and famines, simply was not large enough to fill all the positions necessary in late Roman society.[170] The shortage was particularly acute in the military and in agricultural production, but the solution of filling these positions with Germanic émigrés brought problems of its own, and the Roman bureaucrats of this era were not blind to the dangers inherent in this. Diocletian recognized this explosive situation and attempted to correct

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[170]See Arthur E. R. Boak, *Manpower Shortage and the Fall of the Roman Empire in the West* (Ann Arbor: University of Michigan Press, 1955). Or see Pierre Salmon, *Population et dépopulation dans l'Empire romain* (Bruxelles: Latomus, 1974).

it by making occupations in the army and in agriculture hereditary.[171] Constantine expanded this solution, and by law made more professions hereditary, that is, sons were bound to perform the same occupations as had their fathers.[172] But even this draconian measure was insufficient, and the Christian emperors were forced to offer other incentives to persons to take up certain occupations. Some emperors even felt it necessary to change the principles of heredity for certain occupations.

Women were affected by the changes brought about by the labour shortage when the incentives involved them, as wives, mothers, and daughters, and when new principles of heredity gave them on occasion greater influence than their husbands in the future occupation of their children. In all the ad-hoc legislation on the labour shortage, women were being given more consideration than ever before in Roman law. Women's economic lives were in most cases expanded, and their position advanced, by the legislation in the code.

Constantine offered tax-free status to male workers and their female relatives as an economic incentive to join certain occupations. For example, because of a shortage of architects in the African provinces, he exempted parents of both sexes from their regular services ("ab his quae personis iniungi solent") when their sons studied

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[171] Jones, *Decline*, p. 32.

[172] In contrast, see Perry Anderson (*Passages from Antiquity to Feudalism* [London: Verso Editions, 1974], p. 86): "Decrees penning large groups of the population into caste-like hereditary guilds after the turbulence of the past half century can have had little practical efficacy".

architecture (C. Th. 13.4.1). He also released from regular payment of *capitatio*[173] the mothers and fathers of field army troops, river patrol troops, and imperial bodyguards (C. Th. 7.20.4).[174] Valentinian and Valens, probably feeling the loss of so much tax money, allowed these exemptions only after five years of service (C. Th. 7.13.6; 7.13.7).

Imperial legislators, out of concern for declining numbers of workers, meted out penalties to those who sought to leave or solicit a man to leave certain occupations, and women's role in the economic life of Roman society was considered in these laws as well. Landowners who tried to persuade a man to leave his hereditary profession in order to work on their estates stood not only to be fined, but also to lose this worker, his wife if he had taken one, and any children she had borne. Such penalties were in force for border fortress troops, manufacturers of state clothing (C. Th. 7.14.1), and muledrivers (C. Th. 8.5.58),[175] according to laws of Honorius and Arcadius.

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[173] *Capitatio* was a poll-tax assessed primarily on agricultural persons, and fell quite heavily on them. It was very unpopular, and eventually, in the early sixth century, it was abolished under Anastasius. (Jones, *Decline*, pp. 95, 178. On *capitatio* in detail see André Déléage, *La Capitation du Bas-Empire* (New York: Arno Press, 1975, or for an alternate view, see Walter Goffart, *Caput and Colonate: Towards a History of Late Roman Taxation* (Toronto: University of Toronto Press, 1974).

[174] "Despite these privileges, conscription was very unpopular, it would seem, both among landlords [who furnished the recruits] and the peasantry [who became the soldiers]." (Jones, *Decline*, p. 220). Soldiers even received rations for their families (p. 221).

[175] An important profession, as the muledrivers transported supplies for the army (Lot, *The End*, p. 102).

As the labour shortages in some careers became even more acute, the imperial legislators were sometimes obliged to abandon the hereditary principles of Diocletian and Constantine, indeed, of Roman tradition itself. Thus, a woman on occasion found herself the deciding factor in her husband's or sons' occupations. In some cases, a man was forced to take up the duties of his wife's father's occupation, in others, a man was forced to follow his mother's father's work. Such major breaks with tradition were either not properly understood or not properly followed, for most had to be regularly repeated in the code. These "matrilineal" occupations included breadmaking for a woman's husband and sons (C. Th. 14.3.2; 14.3.14; 14.3.21),[176] the collection of fish for purple dyes, also for a woman's husband and sons (C. Th. 10.20.5; 10.20.15; 10.20.17),[177] and cattle- and swineherding, for a woman's sons (C. Th. 14.4.7; 14.4.8; 14.4.10).[178] Obviously, the

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[176]"Even under the principate the baker's trade (*pistores*) had not been very popular and Trajan had endeavoured to attract freedmen and others to it by the grant of privileges." (Jones, *Decline*, p. 234). Of course, this guild was all the more important, since, from Aurelian's day, bread and not just flour was distributed as the dole. Under Valentinian I, 120,000 persons were given bread in Rome, and in 332, 80,000 persons were given bread in Constantinople, and this was later increased (*Ibid.* p. 233).

[177]These people were called *conchy[lio]legŭli* or *murilegi*. Was the importance attached to this because of declining expertise?

[178]"Pigs were the main meat producers." (Jones, *Decline*, p. 300). Was this idea extended to all guilds of the city of Rome? Although this seems unlikely, C. Th. 14.4.8 records: "Circa reliqua etiam corpora, quae ad privilegia urbis Romae pertinere noscuntur, eadem praecepti nostri forma servetur." C. Th. 14.4.10 specifically links this change with the facilitation of the meat dole. Patrons of butchers and bakers were given the honorific title of *comes* (Jones,

provisioning of society with meat and bread was seen as such an immediate need that the late Roman legislators felt prepared to sacrifice the patrilineal tradition of heredity to it. Such legislation also recognized the role that women played in these industries, even if merely in the handing down of responsibility.[179]

One of the occupations suffering most from the labour shortage was the provincial decurionship.[180] The plethora of laws regulating the decurionship is astounding, and only serves to highlight this. Laws were enacted to prevent any descendants of decurions from escaping their curial obligations.[181] By restricting the marriage of men and women of curial stock with non-decurions, the emperors used women as well as men to preserve this institution. For a woman of curial rank, this meant passing on to her sons her class obligations. Theodosius I refused this type of role reversal, declaring that:

> ...no man shall be bound [to the decurionship] solely by the ties of his maternal ancestry, because the frailty of women has never rendered their

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[178](cont'd) *Empire*, p. 528).

[179]Other sources are more specific as to women's role in certain industries. St. John Chrysostom claimed that marketplaces were full of women buying and selling (*Comment observer la virginité*, 5), and St. Jerome talks about women who owned shops (*Adversus Helvidium*, 21; quoted in Jo Ann McNamara, "Sexual Equality and the Cult of Virginity in Early Christian Thought", *Feminist Studies* III: 3/4 [1976], p. 147).

[180]On the duties of the decurions see Jones (*Decline*, p. 20): "Above all they collected the imperial taxation."

[181]Although the decurionship had begun as a much desired post of honour, its expenses, all borne by the individual councillor, became heavier and heavier, and so little desired. Unfortunately, service was compulsory. (Jones, *Decline*, p. 21).

> children subject to such compulsory services from which the women themselves are considered exempt. (C. Th. 12.1.137)[182]

His sons and grandson, however, were forced to admit to the curial obligations any sons of a woman of curial stock, regardless of the low, even unfree status of the child's father (C. Th. 12.1.178). In spite of this last law, a curial woman was forcibly separated from her mate if she cohabited with a *colonus* or slave (N. Maj. 7.1). If she had no children, a curial woman passed her obligations to her husband (C. Th. 12.1.124).[183]

The same surprising laws of inheritance of status also applied to women who married decurions. Originally, early fourth century law prescribed forced separation for a man of curial rank who escaped his obligations by hiding with a concubine, whether *colona* or slave (C. Th. 12.1.6).[184] Children of such a union, according to Roman tradition, took their mother's status. Legislation of the fifth century, however, although maintaining the need for the separation of the couple, allowed sons of a decurion and a *colona* to take their father's status. This is obviously for the economic benefits which they felt could be gained, since daughters had to keep their mother's status (N. Maj. 7.1). Sons of a decurion and a (free?) concubine were also allowed to follow their father's status, if the local *curia* needed the

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[182]Pharr, p. 362. The frailty is called "infirmitas" and their exemption is "immunitas".

[183]This is logical, since he would receive all his wife's property.

[184]The mention of *colona* is not in the actual law, but is included on the recommendation of Pharr (p. 343, n. 25).

manpower. Such a disregard for the traditional social order points to the severity of the labour shortage in the late Roman decurionship.[185] Because of this, women of curial rank were accorded some place in the determination of the occupations of their husbands and sons.

Another area known to have experienced serious labour shortages was that of the guilds, both municipal and imperial. In particular, late Roman guildsmen sometimes fled their jobs and their obligations to work the land under the economic protection of land magnates. The imperial legislators, concerned with putting a stop to this practice, saw an opportunity both for punishing the guildsmen and landowners, and for increasing membership in the guilds. They did this by evolving a complex system of inheritance of status.

The late Roman laws for escaped guildsmen show the concern for the labour shortage both in the guilds and in agricultural production. The first legislation of Arcadius and Honorius on this subject declared:

> ...the general rule shall be observed that when the marriage is between persons of unequal status, the children shall follow the mother, but when it is a legally recognized marriage, the children shall fall

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[185]It also thwarted the designs of those decurions who cohabited rather than married, so that they could bequeath their estates to their illegitimate sons, but would not pass the obligations of the curia. (Jones, *Decline*, p. 246). In general, the profound effects of the economic crisis on the curial families are discussed by Gaudemet ("Tendances nouvelles de la législation familiale au IVe siècle", *Transformations et conflits au IVe siècle ap. J.-C.* [Bonn: Rudolf Habelt Verlag, 1978], p. 191). He calls this the creation of "une solidarité familiale".

to the father. (C. Th. 14.7.1)[186]

The same emperors, however, later changed this legislation to allow for the division of children born to a guildsman and either a *colona* or *inquilina* or *ancilla*.[187] According to this law, half the children remained on the land with their mother's status, and half were returned with the father to his city (C. Th. 12.19.1).[188] Theodosius II later decreed that an imperial miner who fled the mines to marry also stood to lose some of his children. If he had married a free woman, their children would be divided equally between the fisc and the parents;[189] if he had married a *colona*, the children were divided between the fisc, the landholder, and the parents (C. Th. 10.19.15).[190] These complex problems of status, from the fifth century, show that the labour shortage was becoming more acute, and also that the emperors were hard-pressed to arrive at solutions.

In general, therefore, the labour shortage of the late Roman Empire forced legislators to consider the place of women in the declining professions. For the most part, these considerations affected only the sons and husbands of women. Still, it is significant that this crisis in labour forced

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[186]Pharr, p. 413.

[187]This division was always theoretical, since Christian belief prohibited the actual splitting up of families. The landowners, in this case, would have to provide equivalent replacements. See below, pages 104 to 105.

[188]There was a statute of limitations on retrieving escaped peasants, of thirty years within the same province, and of forty years outside the province (C. Th. 12.19.2).

[189]If there was only one child, the fisc claimed it.

[190]One child went to the fisc, half of the rest went to farm the public lands, and the other half remained with the parents and the private landowner.

the law, and men, to become more flexible concerning the place of women in many occupations, and this flexibility allowed women to take a greater, if still passive role in the law; a role more appropriate to their actual role in the economy of the period.

B. The Economic Crisis and Women

In addition to the labour shortage, the late Roman period experienced other economic problems, including continuously devalued currency, declining legal expertise in financial affairs, and rising taxation burdens.[191] Both Diocletian and Constantine had attempted unsuccessfully to put an end to these problems through extensive economic reforms. Their successors still had to tackle these problems, and they did so in a number of ways. Ideally, the emperors would have been able to garner as many of the resources (through taxes and public services) from their subjects as possible. They were prevented from doing so by the strength of the aristocracy and their need to placate the large landowners and professionals by various exemptions.[192] This was especially true in the west, where the senatorial aristocracy was particularly strong.

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[191]See Anderson, *Passages*, p. 92.

[192]Diocletian, to break the power of the senatorial aristocracy, had excluded them from all real positions of power during his reign. Constantine, however, was forced into concessions of power to the senators to offset his unpopular religious policies. His successors were also forced to concede power to the aristocracy for the same reasons (M. T. W. Arnheim, *The Senatorial Aristocracy in the Later Roman Empire* [Oxford: Clarendon Press, 1972], p. 5).

Moreover, the decline of the legal profession meant laws had to be carefully promulgated to avoid confusion in the law courts whenever possible, and to clarify the legal processes, especially wherever the laws dealt with the transference of large amounts of property between aristocratic families. This clarity was intended to help to preserve the trust of the upper classes in the ruling dynasty. In regard to women, the high burden of taxes on the people and the great need for taxes by the government obliged the lawmakers to reassess once again the role of women from an economic standpoint.

The desperate need of the late Roman emperors for income forced them to offer to women economic positions previously unobtainable. For example, although shipmasters were exempted from taxes by the later Empire, their wives were obliged to remain liable for taxes (*munera*), which thus for tax purposes at least made their income independent from their husbands (C. Th. 13.5.12). Most amazing of the changes is a law of Valentinian and Valens, who abrogate a law (not extant) of Constantine. Constantine had decreed that if a senator was appointed praetor, but died before fulfilling his official duties, his son(s) would have to perform the obligatory public services. If the deceased had only daughters, however, they were relieved of the performance of these duties.[193] Valentinian and Valens, in obvious

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[193]"The sole duties attached to these offices at the time of which we are speaking were the giving of games and theatrical performances and the undertaking of public works, all at the expense of the office-holders. But these expenses

opposition, decreed that:

> For although it appears to be unlawful and disgraceful for women to advance to the Senatorial garb and insignia, nevertheless, they shall be able to assume the obligations of the... praetorship. (C. Th. 6.4.17).[194]

The law makes it clear that this advancement in the status of women was not because of the egalitarian beliefs of these emperors, but because the economic situation was such that they could not afford to lose the public services due in such a case. Thus the emperors had to allow women to assist them in the maintenance of these public services. In this instance, the crisis of the economy served to advance the economic equality of women with men, even if their professional position, as in this case, remained unequal.

In other cases, the Christian emperors were forced to concede exemptions from the much-needed taxes to assist various professions. As we have seen, tax exemptions were given to members of occupations to which the emperor was trying to attract recruits. But these exemptions were also necessary for other professions to guarantee the loyalty of the professionals to the emperor. In these cases, women were given benefits in order to win the support of their male relatives.[195] Exemption from public taxes or curial services

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[193](cont'd) were very great indeed, so great that after A. D. 361 it was made obligatory to give ten years' notice to nominees for the praetorship." (Coster, *Iudicium* , p. 5). Marcian reduced the number of praetors from eighteen to three. (Jones, *Decline*, p. 88).

[194]Pharr, p. 124. Note that women could not inherit the office itself but merely the obligations. Note that the text missing is in the original manuscript.

[195]The official reason given in C. Th. 13.3.3 is: "so that they may more easily train many persons in the liberal

or liability to provide lodging for the military was extended to wives and children of chief physicians (C. Th. 13.3.2) and professors of literature (C. Th. 13.3.3). Wives and children of professors of painting were exempted from tax assessments, lustral tax, quartering of military persons, payment for public places for their studios, restrictions of movement, and personal services (C. Th. 13.4.4). Wives and children of grammarians, orators, and teachers of philosophy, were exempted from municipal, curial, or glebal (Senatorial) taxes, public services, and the liability to quarter judges or soldiers (C. Th. 13.3.16).[196] Although the motivation of these laws was to improve the economic position of the men involved, the laws equally benefited their female relatives.[197] Such indirect improvements in the status of women are common in the Theodosian Code.[198]

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[195](cont'd) studies and the aforesaid arts." (Pharr, p. 388).

[196]The importance of the teaching professions in the maintenance of culture must be underlined.

[197]The role that female relatives played in these professions is perhaps not insignificant. For example, at the time of Constantine, the daughter of Nazarius the rhetorician was considered her father's equal (Friedlaender, *Roman Life*, p. 252). Of course, the philosopher Hypatia of Alexandria became much more renowned than her father Theon, also a philosopher (J. M. Rist, "Hypatia", *Phoenix: The Journal of the Classical Association of Canada*, XIX:3 (Autumn, 1965), 214-25). Ausonius' mother's sister, Aemilia Hilaria, who died still single at age sixty-three, was a physician (David Herlihy, *Medieval Households* [Cambridge, MS: Harvard University Press, 1985], p. 20).

[198]And in a few cases, women by their position were able to benefit male relatives. Constantine exempted Eusebius, father of Eusebia who was the wife of his son Constantius, from the *annona* and other tributes (C. Th. 11.1.1). Theodosius II elevated Asclepiodotus, the maternal uncle of his wife Eudocia, to the position of Praetorian Prefect of

Some exemptions had to be made by the state on the basis of economic hardship, which was extreme for the members of the lower classes. Often these exemptions affected both women and men. One example which remains of this is a law to the men and women of the cities of Armenia and Cappadocia,[199] in which they are exempted from half their tax liability:

> Although formerly the norm of the capitation tax unit was assessed on the basis of one man but two women for each such unit, now the burden of the payment of one capitation tax unit is assigned to two or three men, or to four women. (C. Th. 13.11.2).[200]

The significance of this law is that it gives recognition, although slight and just in these areas, to the economic role which women played alongside men. In general it seems that many of the laws of the later empire did just that.

Clarity in law, because of the already-noted decline of Roman jurisprudence, was an important consideration in late Roman economics. This was especially true in the upper classes where large quantities of goods or property were exchanged.[201] Two points of economic law which greatly

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[198](cont'd) the East (Holum, *Empresses*, p. 123).

[199]Each province had different laws on *capitatio*. In Egypt, only males were counted for the tax. In Syria, males and females counted equally (Jones, *Decline*, p. 34). Herlihy, (*Households*, p. 5), gives as a reason for the differences in tax assessment: "The answer seems to be that domestic units were still too disparate. No common net could catch them all."

[200]Pharr, p. 402. Note that if three men are paying the *capitatio* formerly owed by one man, but that four women are at the same time paying that of two women, then women are paying a greater percentage of the total tax than they did previously.

[201]"Marriage was... the occasion for the transfer of property, in the form of gifts exchanged between the bride

affected Roman women of the fourth and fifth centuries were betrothal gifts (*donatio ante nuptias*)[202] and gifts between family members. In both of these areas, trends may be observed in which Roman legislators reduced the importance of the decision of individual judges by clarifying the laws in these areas down to great detail.

The ownership of betrothal gifts was of major import in the later Empire, since they tended in this period to become greater and greater in value.[203] The legal problem of betrothal gifts occurred frequently, since questions of ownership arose if the marriage did not take place either as a result of a breach of promise or because of the death of one of the fiancés, or when the marriage ended, by divorce or by death of one of the spouses.[204] The detail in which these questions were answered in the Theodosian Code is amazing, reminding one both of the complexities of financial arrangements for the late Roman upper classes, and of the

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[201](cont'd) and groom, or rather, their respective families. These gifts... were a principal conduit by which the old generation transfered wealth to support the enterprise (and encourage the fertility) of the young." (Herlihy, *Households*, p. 14).

[202]The *donatio ante nuptias*, totally opposite to the ancient Roman tradition of dowry, was of Greek or perhaps German origin, and was essentially a bride-price, given to the bride's father to offset the loss of his daughter. It became common in the empire sometime before this period (See Lucien Anné, "La conclusion du mariage dans la tradition et le droit de l'Eglise latine jusqu'au VIe siècle", *Ephemerides Theologicae Lovaniensis* XII [1935], p. 529. See below, pages 152 to 154 for more detail.

[203]Julian even made Italian estates (*fundus Italicus*), the usual ancestral estates of a family, valid for betrothal gifts if given formally by *stipulatio* (C. Th. 3.5.8).

[204]For information on divorce, see pages 105 to 109. For information on the death of spouses and its effects on property, see pages 111 to 112.

concern by the emperors for as much clarity as possible.

Laws on breach of promise (*desponsatio, arra sponsalicia*) grew with and bear witness to the growing importance attached to engagement.[205] In cases of breach of promise, the law at first decreed that the one who broke the engagement must return any gifts, but the other might keep any gifts.[206] No consideration was given to the reason for the breach, since, as Constantine wrote, matters of the parties' honour or reliability should have been investigated before the betrothal (C. Th. 3.5.2).[207] Later, under Gratian, Valentinian, and Theodosius, distinction was made between breaches of betrothal for very young girls, and for girls reaching the age of marriage. If a betrothal was broken off by her father before his daughter turned ten years, he must return all gifts to her fiancé's family. But if he decided to break off the engagement after she reached ten, he must restore the betrothal gifts fourfold (C. Th.

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[205]Almost to its consideration as the marriage. Note the linguistic evolution of *sponsus/a* from fiancé(e) to spouse (see Gaudemet, "Tendances", p. 206; see also Anné, "Conclusion").

[206]Penalties for breach of promise are not in classical Roman law. Gaudemet ("Tendances", p. 195) writes: "le droit classique n'attribuait aucun effet juridique aux fiançailles". In "Transformations" (p. 79) he attributes this change to Christian influence. Anné ("Conclusion", p. 546) adds: "Le mariage contracté au mépris d'une *desponsatio* antérieure est frappé par le Pape [Siricius] de l'anathème et est interdit" (See also Corbett, *Marriage*, p. 15).

[207]St. John Chrysostom agreed, and counselled on the importance of finding a worthy fiancé for a woman contemplating marriage. (M. L. W. Laistner, *Christianity and Pagan Culture in the Later Roman Empire* [Ithaca, NY: Cornell University Press, 1951], p. 81). The Church Council of Elvira (Canon 54) did, however, allow breaches of promise in cases of immorality (see Anné, "Conclusion", p. 543).

3.5.11).[208] This presumably discouraged a man from postponing the wedding date as it approached, or from trying to look for richer fiancées rather than staying with a long established alliance.[209]

The law was also clarified in the event of the death of one of the fiancés. Constantine originally legislated simply enough that all gifts should be returned by both parties (C. Th. 3.5.2). In effect, the betrothal pact was completely erased. He later made one significant change: if the fiancé (male only) died after having exchanged with his bride-to-be the ceremonious betrothal kiss (*osculum*), she was allowed to keep half the value of his gifts (C. Th. 3.5.6).[210] Yet, the male partner could not claim the same consideration. In this case, the money presumably compensated for the loss of the woman's complete purity after having been kissed.[211]

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[208]St. Augustine also mentions age ten as an important year in betrothals. He was engaged to marry a girl of ten, which his conversion prevented. There is no mention of any punitive consequences of his breach (*Confessions* [Reading,U.K.: Cox and Wyman, 1961], p. 130). Note that the Church Council of Elvira punished parents who broke off their children's betrothals with a penance of three years (Anné, "Conclusion", p. 543).

[209]As to the length of betrothals, St. Augustine writes: "It is customary, too, for girls who are engaged to be married to delay the wedding for fear that a husband who has not suffered the trials of a long courtship may think his bride too cheaply won." (*Confessions*, p. 162). St. John Chrysostom also considered a long betrothal normal: "even if he [any man] cannot have a wife from his earliest manhood, let him have a betrothed from the first" (*An Address on Vainglory and the Right Way for Parents to Bring Up Their Children*, trans. by M. Laistner [Ithaca,NY: Cornell Press, 1951], p. 120).

[210]For more on the ceremonies of late Roman betrothals, see Anné ("Conclusion", pp. 526-31). "The Church was slow to develop rituals of marriage." (Herlihy, *Households*, p. 13).

[211]"L'*osculum* était donc considéré comme un premier sacrifice que la jeune fille faisait de sa virginité à son

Problems must also have arisen when the courts were unsure as to what properties were included among the betrothal gifts. A law was therefore enacted to clarify this, one which obliged the parties to register all gifts publicly (C. Th. 3.5.1). In cases where the betrothal gifts had not been registered, women and their blood relatives usually lost their right to the gifts, although allowances were made in these ways: for women who had married as minors (C. Th. 3.5.3; 3.5.13), if the gifts had been made in the presence of witnesses (C. Th. 3.5.7), or if the gifts were valued at less than two hundred *solidi* (C. Th. 3.5.13). The above laws show how little the late Roman legislators left to the judgement of the courts, preferring to delineate the laws clearly themselves. Yet, even an informal commitment (one without *stipulatio*) to give a dowry was binding, by a law of Theodosius II and Valentinian III (C. Th. 3.13.4). The clarification of the economic laws dealing with women in turn made women's economic position much clearer, and thus more easily defended.

For gifts between family members, special clarification was given on two accounts: distinction between formal and informal gifts, and ownership of gifts or inheritances from criminal fathers or husbands. Family politics made some clarification necessary on the former; the rival claims of the innocent family members and the state made them necessary in the latter case.

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[211](cont'd) futur époux." (Anné, "Conclusion", p. 530).

By regulating gifts between family members, late Roman law involved itself once again with the economic lives of women as daughters, wives, and mothers. Constantine originally validated all gifts between parents and children, whether made by formal procedure (*mancipatio*) or not, and whether of special tax-free lands (*Italici fundi*) or not (C. Th. 8.12.4). He obliged other relatives to register gifts publicly (C. Th. 8.12.5). His sons likewise voided any informal gifts between all relatives save parents and children (C. Th. 8.12.6). But they later required even these to use the *mancipatio* for any gifts (C. Th. 8.12.7).[212] Near the close of the fourth century, the right of husbands to recover any informal gifts was once again reaffirmed (C. Th. 8.13.5). Again, the motive behind these laws seems the avoidance of extended legal battles within families by clear legislation.

When a man committed a serious crime, his action aggrieved not only his victim but the state, against whose peace the crime had been committed. This theory had given the state some rights in the criminal's estate, which in the stagnating economy of the late Empire was particularly desirable. These rights were tempered, however, by the rights of the relatives of the man, as his usual heirs. In

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[212]The law is somewhat unclear ("necessarias coniunctissimasque personas"): it may merely be a repetition of C. Th. 8.12.6. Of this law, Buckland (*Institutions*, p. 131) writes: "An enactment of A. D. 355, when *mancipatio* was almost, probably quite, extinct in commerce, required all *donationes* (no doubt of land) inter extraneos to be completed by *mancipatio* and traditio. *Mancipatio* seems to have been already a written document."

later Roman legislation on the property of criminal persons, rights of the relatives won out over the interests of the state. It seems reasonable to assume that this was allowed to happen because the emperors needed the goodwill of the people, especially the upper classes, as much as they needed the extra income. Constantine allowed the wives and emancipated children of a criminal to keep all property and gifts he had given them before his criminal action, even if his crime had been fraud or debt (C. Th. 9.42.1). They were also eligible for inheritances, but persons outside the immediate family were not (C. Th. 9.42.1). By two laws of Constantius with Julian, these gifts and inheritances were allowed to relatives within the third degree of family connection (C. Th. 9.42.2; 9.42.4). Valentinian and Valens repeated this but did not allow children of those guilty of high treason to inherit (C. Th. 9.42.6).[213] Under Gratian, Valentinian II, and Theodosius, this was changed, and parents and children were only entitled to half of the property of a deported criminal, and the treasury received the other half.[214] If the criminal had no children by

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[213]This fits with a statement of Coster (*Iudicium*, p. 11) who writes: "Valentinian was impatient... of any consideration of legal or moral rights of individuals which stood in the way of what he felt ought to be done in the public interest." Jones (*Empire*, p. 421) adds: "This exception [for treasoners] which was steadily maintained, was important. For it was under this head that the treasury made its greatest hauls, the huge properties of great generals or ministers".

[214]Michael Grant (*The Roman Emperors* [London: Weidenfeld and Nicholson, 1985], p. 271) writes: "the laws Theodosius I, even more than those of Valentinian I, showed a passionate determination to augment the influx of tax revenue by every conceivable means."

parents living, he could only keep one-third for them. Children of high treasoners were allowed one-sixth of his estate (C. Th. 9.42.8). If the crime was so serious that the man was executed, the same emperors decreed that he could leave all of his estate to his children, or failing them, half to his grandchildren, or failing them, one-third to his parents, or failing them one-quarter to his siblings or paternal grandparents, and the treasury received the remainder (C. Th. 9.42.9).[215] Although no mention is made of the man's wife, presumably her dowry was returned to her, and this is confirmed by a later law of Arcadius and Honorius (C. Th. 9.42.15). Even a child born posthumously could receive a share of an executed father's estate (C. Th. 9.42.10). One final law, of Honorius and Theodosius II, upheld the laws of their predecessors (C. Th. 9.42.23). Of great interest is the fact that none of these laws clearly distinguish between daughters and sons in rights to gifts or to inheritances.[216]

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[215]Exceptions may have been made in cases of extreme poverty, as is implied in C. Th. 9.42.12.

[216]With a tradition of jurisprudence as highly evolved as the Roman system was, it is surprising to find ambiguity in the legal terminology for children (sometimes *liberi*, sometimes *filii*). While *liberi* clearly refers to children of both sexes, *filii* sometimes means "sons", sometimes "children", but there is no sharp distinction. Most jurists thought that *filii* could mean both, but was usually understood as children of both sexes. There is likewise no pattern from the Theodosian Code. Contrast C. Th. 8.18.9 where *filii* apparently means "sons", with C. Th. 8.18.10, where it obviously means "sons and daughters". This typical ambiguity was probably beneficial to daughters. See *Vocabularium Iurisprudentiae Romanae* ed. by Otto Gradenwitz, [Berlin: G. Reimer, 1903], Vol. II, p. 862 for *filii*; Vol. III:2, pp. 1568-9 for *liberi*.

In general, women in the later Roman Empire found new strength in the economic and demographic crisis. This is not to say that they did not suffer from the hardships equally with men, or that they were not still excluded from the real positions of economic power, but rather that the laws enacted to combat the decline of the economy forced Roman society to consider the role women played in the economic life of Rome, especially by clarifying their position as heiresses, both of property and of status. Women's actual economic lives certainly changed, but changed because of the harsh economy experienced by most. Their economic position in relation to men may not have changed at all in fact, but there was a great change in the way women were viewed and allowed to contribute economically.[217] Women were then more capable of assisting men in the maintenance of society. When discrimination between the sexes was no longer practicable economically or politically, some of the barriers to the legal equality of women in financial matters were thrown down.[218] In this context it is quite appropriate to speak of the economic betterment of women.

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[217] Or was there an actual change in women's economic lives? Herlihy (*Households*, p. 21) writes: "Perhaps for reasons of acute depopulation and shortage of labour in the late empire, women, at least in the towns, seem to have become capable of pursuing a career and supporting themselves, if they chose." While this hypothesis seems supported by the literary evidence, it is impossible to make the same claim from the Theodosian Code alone.

[218] In a feminist analysis: "Where women have relatively more economic power, they are able to have somewhat more control over their lives than in societies where they have no economic power." (Lerner, *Creation*, p. 217).

V. THE THEODOSIAN CODE AND THE SOCIAL POSITION OF LATE ROMAN WOMEN

The demographic and economic crises in the Roman empire of the fourth and fifth centuries were serious enough, but in the same period the whole framework of society was being transformed. Economic problems polarized society more and more between the extreme rich and the extreme poor. The upper classes themselves were gaining greater power within the state, as officials in its bureaucracy, and their growing wealth, contained within fewer and fewer families,[219] was becoming a rival source of power to the emperor.[220] The lower classes too were transformed, as the distinctions between the unfree, the semi-free, and the low-born free were gradually eroded.

Within the family, changes were also transforming society.[221] Once the hallmark of Roman society, the traditional family was definitely being restructured, as evidenced by the erosion of the institution of *patria potestas* to near disappearance, which transformed the way

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[219]As Arnheim writes: "the aristocracy formed a very close-knit and exclusive circle and tended to marry within their own ranks." (*Aristocracy*, p. 18).

[220]Especially in the west. The riches of the aristocracy are well exemplified by St. Melania the Younger and her husband Pinian. When Pinian decided to sell his estate in Rome, not one senator, nor even the empress Serena had the money to buy it (Elizabeth A. Clark, *St. Melania the Younger* [New York: E. Mellen Press, 1984], p. 38). In fact, "the average income of the Western aristocracy in the 4th century was something like 5 times that of its predecessors in the 1st century." (Anderson, *Passages*, p. 101. See also Jones, *Empire*, pp. 554-7).

[221]Not surprisingly, according to one historian. "Class hierarchy is constantly reconstituted in the family through sexual dominance." (Lerner, *Creation*, p. 216).

women regarded themselves and the world around them. Christian beliefs replaced the emphasis on women as daughters, wives, and mothers, with the idea of women as individuals.[222] The abundance of laws arising from these two trends, the decline of *patria potestas* and the rise of Christianity, make these changes all the more obvious.

A. The Decline of *Patria Potestas*

Patria potestas, the absolute power of a Roman father over his wife and descendants, had, as we saw in chapter two, been one of the earliest Roman social institutions. *Patria potestas* had begun its decline in the republican period, a decline which was promoted by the early emperors of Rome, anxious to assert their own powers in opposition to those of the head of the family. The *paterfamilias'* power over his wife had been curtailed in this period, particularly by the discouragement then prohibition of *manus* marriages, which, as we have seen, would allow men complete control over their wives. In contrast, the father's legal control over his children was virtually unaffected by the Augustan legal reforms. Women's legal status as daughters remained unchanged from the republican period. What is significant in the late Roman legal reforms is the decline

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[222]As writes Jean Gaudemet (*Le droit privé romain* [Paris: Armand Colin, 1974], p. 34): "les nouvelles conceptions de la famille et le progrès de l'individualisme en font apparaître de nouvelles [causes pour l'extinction de la puissance paternelle]"). The rise of individualism is more fully discussed at the start of chapter five.

of *patria potestas* over children.[223] Many passages from the Theodosian Code bear witness to the growing number of rights enjoyed by children over their fathers.[224] In the following laws, legal reality seems to assume an already existing social reality. The social changes, one may assume, forced the legal changes.[225] That these changes affected women in their role as daughters is undeniable. But it also affected them as mothers, since the growth of a child's right over one parent was inextricably linked with the child's right over the other. The laws of the Christian emperors of the fourth and fifth centuries A. D. cemented into place these new rights of women within the family.

Many laws indicate the decline of the father's legal rights over the rest of his family. Foremost, the decline of his rights over his wife continued. As this happened, the woman as wife became more and more a legal entity in her own right.[226]

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[223]"*Le système de protection* [*sic*] établi au profit des enfants consista à limiter les droits de leur père." (Humbert, *Remariage*, p. 397). He calls this "une réforme incontestablement révolutionnaire" (*Ibid.*, p. 398). Jack Goody claims that Christianity sponsored a "child-oriented family" (*The Development of the Family and Marriage in Europe* [Cambridge: Cambridge University Press, 1983], p. 153).

[224]"Mais surtout le droit du Bas-Empire se soucie du sort des enfants nés de la première union." (Gaudemet, *Droit*, p. 30).

[225]According to the precedence of Roman society (late Republic, early Empire) and the experience of most cultures.

[226]Gaudemet writes: "la situation de la mère, déjà améliorée au cours de l'époque classique, se fortifie. Si la mère n'intervient pas dans l'exercice d'une *patria potestas* qui reste exclusivement masculine, des rapports de droit entre elle et ses enfants, en particulier en matière successorale, sont nettement affirmés." ("Tendances", p. 202).

The decline of *patria potestas* is especially evident in the restrictions on the right of a husband to the property brought by his wife into the marriage, either as dowry or as an inheritance from her blood relatives. No man was allowed any right except usufruct in his wife's dowry: ownership was reserved for their children (C. Th. 3.13.3; N. Th. 14.1).[227] Likewise, husbands were forbidden access to property received by their wives from her blood relatives during the marriage, and so, they could not interfere with the inheritance of such properties from a mother by her children. In fact, fathers were repeatedly denied the authority to alienate property inherited by their sons or daughters from the children's mother or her blood relatives (C. Th. 8.18.1; 8.18.2; 8.18.3; 8.18.6; 8.18.7; 3.13.3; 8.18.9; 8.18.10; 8.19.1; N. Val. 35.1).[228] Further restrictions were placed on a father who remarried (C. Th. 8.18.3; 8.18.10).[229] Women were even allowed the right to give their property to their children while still alive, if they so chose, without interference from their husbands (C. Th. 2.24.2). These laws all translate as greater independence for a woman from her husband in legal matters.

The decline of *patria potestas* is even more evident in the greater restrictions of the rights of fathers over their

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[227]The dowry now became more of a trust (Schultz, *Classical*, p. 125). Was this a Greek influence? (Jolowicz and Nicholas, *Introduction*, p. 472).

[228]Does the number of times this law was repeated mean that it was seldom followed?

[229]For more on the effects of remarriage on family laws, see below, pages 118 to 122.

daughters. This trend is a new one in Roman history, related to but distinct from from the trend of greater freedom for wives. And while the origin of the decline of power of a man over his wife has clearly been pinpointed to the decline of *manus* marriages, the origins of the decline of the power of a man over his children have generally been left unexplained by historians. What the evidence shows, though, is that the changes in the fourth and fifth centuries in the rights of a father over his daughters were significant, and can be linked together as evidence of a trend in this period.

Greater liberty for children is the corollary of the greater freedom for wives shown above to have occurred in this time. Just as wives were granted independence from their husbands in making bequests, daughters were also granted greater independence in receiving these bequests without interference from their fathers. A perfect example of this is the laws which grant ownership of a woman's dowry to her children (C. Th. 3.13.3; N. Th. 14.1).

Greater freedom was also accorded children independently of their fathers. In other words, laws were created which changed the nature of the father-daughter relationship, so central to Roman family relations.[230] Fathers were forbidden rights over their children which traditionally had been theirs. The law giving fathers automatic ownership of any legacies inherited by their young children under age six was repealed early in this period (A.

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[230]The "filiafocality" coined by Hallett in her excellent book, *Fathers*.

D. 339; C. Th. 8.18.4). A father was also denied the right to favour one daughter over his other children in the area of finances, a right traditionally his. Thus if he gave too much of his estate as a dowry to one daughter, his other children could take him to court to have his action revoked (C. Th. 2.21.1).[231] The mere fact of a man's children being able to take him to court is remarkable. The greater restrictions on the rights of a father combined with the greater independence in the husband-wife relationship meant that a father was forbidden any ownership of any property left to his son by his son's wife, or to his daughter by his daughter's husband. This was so even if the son or daughter were still under his *potestas* (C. Th. 8.19.1), although by an anachronism any property of a child under *potestas* was still considered *peculium*, that is, actually owned by the *paterfamilias* (C. Th. 1.34.2). Nevertheless, if his daughter or son died, the estate, even as *peculium*, passed to his grandchildren, and he could not keep it (N. Th. 14.1). Women, with their brothers, were hereby also given greater liberty in rights of inheritance in inverse proportion to

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[231]Though this law likely benefitted sons most. Yet, by what is called the Carbonian Edict, a child born posthumously also has equal rights of inheritance with its siblings (C. Th. 4.3.1; also C. Th. 9.42.10). Moreover, as a logical extension, if a daughter who had already recieved a dowry from her father wanted more of his estate at his death, she was obliged to divide her dowry equally with her father's other heirs as well (C. Th. 4.2.1). Perhaps this was the case with Athenais, the future empress Eudocia, who according to one legend had been left only one hundred coins (of unspecified denomination) by her father's will, and her brothers refused to share with her any portion of their inheritances (Holum, *Empresses*, p. 113).

the greater restrictions on their fathers' rights. There are limitations, however, to the decline of *patria potestas* which occurred in the fourth and fifth centuries, and fathers still retained some authority over their daughters.[232] Even though a father might not alienate property inherited by his children from his wife's relatives, he did have usufruct; that is, as long as his children were minors, the profits garnered from the properties were his (C. Th. 8.18.1; 3.13.3; 8.18.9; 8.18.10). A father, of course, did possess ownership over all properties bequeathed to his children from his relatives (C. Th. 8.18.6). If a daughter (or son) died before her father but after having children, usufruct of any properties belonging to her children belonged to her father, the children's grandfather (C. Th. 8.18.9; 8.18.10). Although the institution of *patria potestas* had declined to a shadow of its former self, there still remained some remnants of the authority to this time.

Formal emancipation of daughters from *patria potestas* further restricted the fathers' rights. The number of times emancipation is mentioned in laws, as well as the benefits

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[232]Even in Christian theory: "Les Pères [de l'Eglise], d'ailleurs, n'ont nullement perdu le sens de l'autorité paternelle... Augustin affiche un grand souci de l'ordre dans la cité. Et c'est au père qu'il revient d'*administrare domesticam pacem*." (Gaudemet, "Les transformations de la vie familiale au Bas-Empire et l'influence du christianisme" *Romanitas* IV [1962], p. 70). According to St. Ambrose, the father "non est dominus, sed maritus, gubernator non praepotens." (*Ibid.*, p. 72). Tertullian, Ambrose, Augustine, and Salvian all speak of the *paterna pietas* correcting the *patria potestas* (*Ibid.*, p. 74).

accruing to a father who emancipated his daughter in this period, lead one to suspect that the granting of independence to daughters in the fourth and fifth centuries became more and more common.[233] A law of Constantius and Constans confirms the right of the praetor to emancipate persons from their father's *patria potestas* (C. Th. 6.4.16).[234] As economic incentive for a man to emancipate his children, no more was needed than to give him first one-third, later one-half, of all maternal inheritances received by his daughters and sons while minors, if he granted them the formal independence (C. Th. 8.18.1; 8.18.2; N. Val. 35.1).[235] This financial reward was a mixed blessing, because once a woman was emancipated, her father lost all real rights to her money. Thus the property of an emancipated woman who had children, even if she died without *ius liberorum* and "under a fiduciary obligation", passed to her children and not to her father (C. Th. 5.1.3).[236] Of course, the reverse was also true, and when a woman became emancipated, her children lost all right to her father's

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[233]After Trajan, there existed an obligation for fathers who maltreated their children to emancipate them (Gaudemet, *Droit*, p. 39). Means to emancipate children were also simplified (*Ibid.*, p. 35). Gide (*Etude* p. 185) calls the increasing number of emancipations in the later empire one of its most important legal changes.

[234]In one of the few remnants of the praetor's judicial powers. (Gibbon, *The Decline and Fall of the Roman Empire* [Kingston, TN: Viking Press, 1952], p. 349; also Coster, *Iudicium*, p. 5). Incidentally, a daughter was also automatically emancipated from a father who tried to prostitute her (C. Th. 15.8.2). See below, pages 141 to 142.

[235]The first two laws grant them one-third, the last grants half.

[236]Pharr, p. 104.

estate.[237] Oddly enough, emancipation did not affect the rights of the daughter's children to inherit property from their mother's mother. The explanation given for this discrepancy is that emancipation, because it dissolved *patria potestas*, affected only the father-daughter relationship, and not the mother-daughter relationship, to which *patria potestas* did not apply (C. Th. 5.1.6). Emancipation, as it became more common in the fourth and fifth centuries, gave women unrestricted freedom from their fathers.[238]

Although we have examined the changes in the legal status of the husband-wife relationship and of the father-daughter relationship, we have yet to examine the changes in the mother-daughter and mother-son relationships. It must first be said that the very existence of these relationships as legal entities is in itself amazing, and a break with Roman tradition. In earlier Roman society, the mother, being *in filiae loco*, had no specific legal relationship with her children. Although some changes had previously occurred, the fourth and fifth centuries witness a parallel development between mother-child as between father-child.

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[237]This is implied in C. Th. 5.1.6. Were exceptions made if the deceased woman had no surviving siblings?

[238]No explanations are given for why the number of emancipations increased. Because, however, most of the laws assume emancipation after the death of the children's mother, it may be that financial motivation is behind this: because the fathers could not alienate maternal inheritances while their children were in their *potestas*, emancipation freed them to alienate their third or half.

As children's rights vis-à-vis their fathers grew, their corresponding rights vis-à-vis their mothers also grew. This natural development had great significance for women both as daughters and as mothers. Specific laws echo this principle, and so many of the changes in the mother-child relationship parallel those of the father-child. Just as fathers were forbidden to alienate the dowry of a deceased mother from their children, mothers were forbidden to alienate the betrothal gifts they had received from husbands after the man's death, but were obliged to retain them for their children (N. Th. 14.1). Mothers could not, of course, interfere if any bequest had been made by the deceased father directly to their children (N. Val. 14.1). And just as a father could not favour any one of his children, likewise the widowed mother had to divide the estate received from her husband equally amongst her children in her will (N. Maj. 6.1; N. Sev. 1.1).

Because all of the above laws which create the new relationship between mothers and their children are novels of the fifth century and so postdate the laws of the fourth century creating the new relationship between fathers and their children, it is tempting to see in this development a chronological pattern. Did the legislators of the fifth century, after viewing the gradually improving legal status of children in regards to their fathers, feel that a deliberate degradation of the legal position of mothers in regards to their children was in order? Such a move could

have been justified in the minds of the emperors in order to balance the rights of mothers and fathers over their children.[239] In fact, we have a law dealing with inheritances from children which suggests just that. In A.D. 426, the emperors Theodosius II and Valentinian III wrote: "We shall not allow fathers to be legally inferior [minor] to mothers in any particular." (C. Th. 4.1.1). Although no certain conclusion can be drawn from this one quotation, such an attitude would not be at all surprising.

Yet there were also restrictions on children's rights of inheritance from their mothers, just as there were restrictions to their rights of inheritance from their fathers. The limitations recorded in the Code deal with the children's right to receive inheritances from maternal grandparents if their mother was already deceased. Children were only allowed to take possession of two-thirds of a bequest from a maternal grandparent or paternal grandmother if they had (maternal) aunts or uncles still living, who received the other third. If they had no aunts or uncles but great-aunts or great-uncles, the children would succeed to three-quarters of their grandparent's estate, and the brothers and sisters of the newly deceased would receive the other quarter (C. Th. 5.1.4). A decade later, another law required such children hoping to receive a share of the estate belonging to their deceased mother from her parents

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[239] Was this a moral decision or a financial one: to hold family inheritances together better? Or could the laws have been promulgated with the idea of legal simplification in mind?

to bring their mother's dowry into a common fund to be divided as well amongst their grandparent's heirs as well (C. Th. 5.1.5).

Confirmed as well was the right of children over non-relatives. Children, even emancipated ones, kept most of the property and gifts from a criminal father, even one jailed for debts or fraud, and thus took precedence over the right of the fisc.[240] And children of a freedperson (male or female) were considered the natural heirs to their parents and thus excluded their parents' manumitters or the heirs of the manumitters from their parents' estate (N. Val. 25.1).

The period of the later Roman empire witnessed the waning of the traditional Roman institution of *patria potestas*, and by extension, the exclusion of the rights of mothers over their children. As we will see below, such a leap forward in the status of children is due to the later empire's concern for the rights of the individual, and to Christianity's belief that children are human beings with rights. The decline of *patria potestas* was a social change which had significant effect on the lives of later Roman women, equally as wives, as mothers, and as daughters.

B. The Reassertion of Roman Tradition

No action is without a reaction, and the social transformation of women in the fourth and fifth centuries was bound to have its antithesis. As regards the status of

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[240]See above, pages 72 to 74 for details.

women in society, attempts were made to reaffirm the traditional position of women within the family, and within society as a whole. Such laws were often piecemeal in areas such as marriage and inheritance, and were soon made obsolete by the new legislation on those matters. But in other areas, traditional values were consistently upheld, in spite of the social and economic pressure to change: examples are the laws on the continued necessity of a dowry, the ban on "marriages" of free and enslaved persons, the exemption of women from the duties of decurions, and the proscription against female advocates.

The dowry was a traditional feature of Roman marriage, and many of its traditional aspects were reaffirmed.[241] As evidence of this, Julian referred questions on dowries to the jurist Paulus' writings (C. Th. 3.13.2).[242] The traditional separation of the dowry from the rest of the husband's property was also repeated. Thus, the wife of a man condemned to death was able to withdraw her dowry and the antenuptial gifts before his estate was confiscated (C. Th. 9.42.15). Likewise, if a husband died, the dowry

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[241]According to Roman tradition, "certains juristes romains conclurent que, dans une union entre personnes de condition inégale, l'acte de dotation était requis pour établir, chez le mari, l'intention de prendre la femme pour son épouse légitime et non pour sa concubine." (Anné, "Conclusion", p. 522). This was taken up by Christians as well, and Pope Leo I added the presence of a dowry to mutual consent as the two requisites for a proper marriage (*Ibid.*, p. 521).

[242]The mention of Paulus by name is name is actually only in the *interpretatio*. In general, Julian's laws exhibit the admirable goal of "endeavouring on many fronts, minor as well as major, to simplify the bureaucracy of the empire" (G. W. Bowersock, *Julian the Apostate* [London: Duckworth, 1978], p. 74). This law exemplifies this endeavour.

reverted to his wife and not to his blood relatives (C. Th. 3.13.3). As well, the continued need for the presence of a dowry within marriage was confirmed: thus, a husband could not give back the dowry to his wife as a gift (C. Th. 3.13.3). In a remarkable break with tradition, Theodosius II and Valentinian III removed the necessity for a dowry in marriage (C. Th. 3.7.3),[243] but later Leo and Majorian re-established the Roman tradition that marriages without dowries were invalid (N. Maj. 6.1). Late Roman legislators, in spite of the probable pressure put on them by social and ideological change, confirmed in law the need for a dowry in marriage.[244]

The emperors of the fourth and fifth centuries also overwhelmingly continued the ban on intermarriage of free women and enslaved men. Constantine reaffirmed the *senatusconsultum Claudianum*, by which any free woman who cohabited with a slave forfeited her freedom and that of her children (C. Th. 4.12.1).[245] At first, Constantine

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[243]Pharr (p. 70) suggests that the emperors merely removed the need for documentary evidence of the dowry, and not the dowry itself. The Code itself says "donationem ante nuptias vel dotis instrumenta" (Theodore Mommsen and Paul Meyer (ed.), *Theodosiani Libri XVI cum Constitutionibus Sirmondianis et Leges Novellae ad Theodosianum Pertinentes* [Berlin: Druckerei Hildebrand, 1962/orig. 1904], p. 142).

[244]Gaudemet sees a link between the continued need for a dowry in marriage and the growth of private marriages. "Le droit du Bas-Empire insista sur l'opportunité d'actes qui assureraient la publicité de l'union... la remise d'une dot, la rédaction de l'écrit constatant cette remise et fixant le sort des biens dotaux sont de plus en plus souvent signalées comme l'accompagnement normal de l'échange des consentements, qui lui peut rester secret." (*Droit*, p. 27).

[245]This law was supposed to be retroactive, although this was hardly good legal practice.

stipulated that a formal notification (*denuntiatio*) was needed for the loss of status to occur (C. Th. 4.12.2),[246] but he later revoked this law (C. Th. 4.12.4(5)). Constantine also exempted women who lived with fiscal slaves from this censure, allowing the union but giving the offspring the status of Latins. In the law, he recognizes that these unions are formed through "either an imprudent error or simple ignorance or a lapse due to the frailty of youth." (C. Th. 4.12.3).[247]

Constantine's successors continued this condemnation. Julian invalidated all laws contrary to the *senatusconsultum Claudianum*, but continued the exemption from this for the fiscal and municipal slaves (C. Th. 4.12.5(6)). Valentinian and Valens again repeated the sanctions condemning to slave status a free woman joined to a slave, saying the woman deserves slavery "If in the estimation of a lustful women her concupiscence is of more importance than her freedom" (C. Th. 4.12.6(7)). They also made a free woman who cohabited with an imperial weaver subject also to loss of status (C. Th. 10.20.3). Later, the emperors Gratian, Valentinian II, and Theodosius added imperial minters to this category, so that a free woman who lived with one of them also took his status (C. Th. 10.20.10). Arcadius and Honorius brought back the formal notification for loss of

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[246] Just the *interpretatio* survives.

[247] Pharr, p. 93. Constantine does not allow this exemption for municipal slaves, stating that he does not want to usurp any of the traditional authority held by the municipalities in this matter.

status (C. Th. 4.12.7(8)). Valentinian added the clarification that for a freewoman who cohabits with a slave or a *colonus*, all children born before the formal warning of enslavement will bear the status of *coloni*, after the warning, slave (N. Val. 31.1). Although these constant condemnations probably indicate that the laws were not being obeyed, the legal nature of such "marriages" are definitely dismissed.

Constantine also issued another law of a similar nature, one condemning "marriage" by a freewoman and her own slave. He prescribed exile from her province as punishment for the woman, since she could not become her own slave, and the man was sentenced to death. She was also forbidden to leave her property or her status to her children by this union, although the children did remain free (C. Th. 9.9.1). Why women who cohabited with their own slaves did not risk the loss of their own freedom to the imperial estates, perhaps, is not known.[248] In the next century, the law was expanded through the appeal of one woman, Julia, who had attempted to circumvent the first law by freeing her slave before marrying him. This legal manoeuvre was condemned, although Julia herself was immune from prosecution (N. Anth.

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[248]Perhaps this law belongs with laws on adultery, since the *interpretatio* speaks of her husband, and the main body of the law speaks of her legitimate children, so one might assume this forbids sexual unions between married women and their slaves, especially attempts to pass off the children as her husband's, and give them the rank and inheritance of her husband. Yet other parts of the law imply that it is a new prohibition, which laws against adultery were not. Mine is also Pharr's interpretation.

11.1).[249]

Fewer laws restrict the cohabitation of free men and enslaved women. Such unions were traditionally tolerated as concubinage, and free men were perfectly entitled to marry a former slave whom they had freed. A free man might just as easily leave the woman in her slave status, in which case the children, as tradition decreed, followed the status of their mother (C. Th. 4.8.4; 4.8.7). The men in such relationships were never in any danger of losing their freeborn status.

No changes were made in the inequality of performance of duties of decurions, in spite of all the changes to the inheritance of curial status.[250] For the entire period, the tradition exempting curial women from the performance of the public duties of their status was upheld (C. Th. 12.1.137).[251] If women were exempt from the duties of a decurion, however, they were also exempted from the privileges. Thus a decurion elevated to the rank of senator might pass on this benefit to one of his sons, but never to a daughter (C. Th. 12.1.74).[252] For this same reason, a decurion who had only daughters could not usually leave them all of his estate. If these daughters were married to

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[249]The emancipation of, then marriage to, a female slave by her master, an accepted Roman practice, was not condemned.
[250]See above, pages 59 to 61.
[251]Most likely because of sentiments like those of Lactantius, tutor to Constantine's son Crispus, who once remarked: "how great will be the unhappiness of that city where women fill the places of men." (Quoted in Laistner, *Christianity*, p. 50).
[252]This privilege also lost to sons by C. Th. 12.1.93, but regained by C. Th. 12.1.132.

decurions, or married one within three years of their father's death, they might receive the whole share of their inheritance, for such a male would perform her services. Even if she were illegitimate, she could receive all of her father's estate, minus only one quarter, if she married a decurion (N. Th. 22.2).[253] All this only occurred if her husband was of the same municipality as her father; if not she forfeited a quarter of her inheritance (N. Maj. 7.1), for although her husband and sons were obliged to the services, they were not services to the *curia* to which she was born. Even if her father had abandoned his position as decurion for the noble pursuit of the priesthood,[254] his daughter could only receive half of his property and this only if she was married to a decurion (N. Maj. 7.1).[255] Thus, although women were a consideration in the passing on of curial obligations to husbands and sons, Roman tradition, in spite of the rough economic times, forbade them parts of their inheritance rather than yield to them any part in the performance of these obligations.

Finally, the *senatusconsultum Velleianum*, the law denying any rights of advocacy in the law courts was upheld by late Roman legislators.[256] Constantine expressly upholds

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[253]What the daughter was unable to inherit went to the *curia*. As Jones writes, some cities were able to build up sufficient capital, in like ways, to lend it out at interest (*Decline*, p. 248).

[254]Which he could only do if he renounced all his possessions.

[255]Likewise, if her father became a criminal, she could only inherit half of his estate, although a man would be able to inherit the full estate (C. Th. 9.42.24).

[256]See Gaudemet ("Statut", pp. 213-4) who defends attacks

the tradition in his decree:

> ...women do not have the right to prosecute public criminal suits, except in certain cases, that is, when prosecuting a case of outrage [*injuria*] to themselves or to members of their families... (C. Th. 9.1.3).[257]

Advocates were even warned in the law not to work for women who wished to assist in other's cases. It is possible, however, that married women did not even defend themselves in court, for we have a law from Theodosius I regulating the defence of wives' cases by their husbands (C. Th. 2.12.4). Theodosius also upholds the ban on female advocates:

> In no way can women conduct lawsuits further than they are legally qualified, nor can they intervene for other persons. (C. Th. 2.12.5).[258]

We have two examples of court cases involving actual women from the Code itself. In the first, one woman, Pelagia, defended her right to an inheritance left informally to her by another woman, Micce (N. Val. 21.2). This was possible according to the aforementioned laws. In the second, a man, Auxiliaris, claimed property also claimed by a man, Apollodorus, who had been sold the property by two women. This was denied since the women would be acting on behalf of a third party. In this case, Valentinian III, true to tradition, refused to the women any right of action in assistance of Apollodorus (N. Val. 8.1; N. Val. 8.2). In this instance, we have examples of the laws in action.[259]

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[256](cont'd) that the *senatusconsultum Velleianum* was no longer in force.
[257]Pharr, p. 224.
[258]*Ibid.*, p. 48.
[259]And perhaps of the laws disobeyed. Apparently when Athenaïs (the future empress Eudocia) presented her suit

The laws in this chapter indicate that, in spite of the pressures to change brought about by social and economic forces, some areas dealing with women remained the same. In these areas, the legal position of women remained much as it had from the early imperial period, or even before. This remarkable resistance to change forces us to admit that especially the public conduct of women was kept much the same.[260] By refusing to admit women into any judicial or administrative positions of power, the legislators stunted the legal advances of women.

Generally the social standing of women as witnessed from the Theodosian Code was ambiguous. Certainly within the family, women gained greater freedoms from their fathers and their husbands. Yet outside the home, they remained as limited as before in terms of social responsibilities or social control. They were also restricted (equally with men) by the continued necessity for a dowry and the ban on mixed slave-free marriages. In the next chapter, this discrepancy between the partial advancement of women and their partially continued restriction is also evident.

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[259](cont'd) against her brothers for her father's estate (see above, page 81, footnote 231), she did it with the help of two aunts, one paternal and one maternal (Alan Cameron, "The Empress and the Poet: Paganism and Politics at the Court of Theodosius II", *Yale Classical Studies*, 27 [1981], p. 275). Was this a formal suit, or an informal one?

[260] Compare with an early feminist analysis (Beauvoir, *Deuxième Sexe*, Vol. I, p. 153): "la Romaine de la decadence est le type de la fausse émancipée qui ne possède, dans un monde dont les hommes demeurent concrètement les seuls maîtres, qu'une liberté vide: elle est libre 'pour rien'."

VI. THE INFLUENCE OF CHRISTIAN IDEOLOGY ON THE POSITION OF LATE ROMAN WOMEN

The gradual conversion of the Roman people to Christianity is generally accepted as one of the most profound of the social changes of the late Roman empire. Christianity affected the political life of each Roman citizen in the fourth century, and by the fifth, it affected almost everyone in a personal way as well.[261] It is obvious, then, that the growth of Christianity would affect the status of women in a profound way.[262]

Christians had definite ideas on the position of women in the family, and within society as a whole.[263] That these ideas influenced the Romans of the fourth and fifth centuries is undeniable: Christianity at this time was a fiercely militant ideology which demanded total mental and emotional participation from its adherents. Christian Romans could not help but hold strong beliefs on the place of women in society and in the family, and they felt they had the divine authority to put those ideas into practice.

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[261]"In the course of the fifth century, the pagans, who had been in a majority, became a minority" (Lot, *The End*, p. 42). For a recent comprehensive study of early Christianity, see W. H. C. Frend, *The Rise of Christianity* [Philadelphia: Fortress Press, 1984]).

[262]"The religious movements of the first century, which increased in the second, and in the third and fourth attained their height, affected women most." (Friedlaender, *Roman Life*, p. 255). He adds that indeed, oriental religions were especially popular with women (*Ibid.*, p. 256. See also Fau, *L'émancipation*, p. 189).

[263]See Eph. 5:22-33; Col. 3:18-21; Tit. 2:3-5; 1 Pet. 3:1-6. For a thorough examination of the early Christian writers and their ideas on women see Jean Laporte, *The Role of Women in Early Christianity*, Vol. 7 of *Studies in Women and Religion* [Toronto: The Edwin Mellen Press, 1982].

The Christianity of the fourth and fifth centuries was bound to conflict with Roman ideas of the person. Roman women had always been considered only within the family unit, and it was by identifying themselves with their family that they had found social worth.[264] Christian belief, in contrast, placed much more emphasis on the individual than on any group, including the family.[265] This emphasis had its origin in Jesus's teachings on personal salvation and individual worth.[266] The early Christian church, because of its growth by individual conversion often in spite of the influence of the family, had re-emphasized this individualism.[267] Thus, even though Christianity reconfirmed

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[264]There are only a few exceptions to this rule.

[265]Christianity also emphasized personal salvation in contrast to the welfare of the state. As T. R. Glover, *Life and Letters in the Fourth Century* [New York: Russell and Russell, 1968], pp. 278-80 writes, in fact the typical dilemma of humanity lies between: "the tendencies to make the group and the individual the unit of life." M. Bouché-Leclerq theorizes that emphasis on the individual may have been a common element in all of the eastern mystery religions (J. Bury, "Introduction" in *The Amazing Emperor Heliogabalus* by J. S. Hay [London: MacMillan and Co., 1911], p. xxiv).

[266]For Jesus's downplaying of the family see: Mt. 8:21-22; Mt. 10:37; Mt. 12:46-50; Mt. 19:29; Mk. 3:31-35; Mk. 10:29-30; Lk. 11:27-28; Lk. 18:28-30. See C. Morris, *The Discovery of the Individual: 1050-1200* (New York: Harper and Row, 1972), p. 10 ff. for Christianity's influence on the birth of individualism. In fact, he calls St. Augustine's *Confessions* an important milestone in this, as the western world's first autobiography (*Ibid.*, p. 16).

[267]For Jesus's predictions on how he would divide the family, see Mt. 10:21-22; Lk. 12:51-53. Paul, recognizing the difficulties in these family relationships, allowed for separation of spouses when one was Christian, the other pagan: 1 Cor. 7:12-16. "The mixture of pagans and Christians in aristocratic families of late antiquity has been well-documented." (Clark, *Melania*, p. 133. See also P. R. L. Brown, "Aspects of the Christianization of the Roman Aristocracy", *Journal of Roman Studies*, LI [1961], 1-11; and Anne Yarbrough, "Christianization in the Fourth Century: The

the idea that men and women were different and equal, it still concluded that both men and women found their worth as individuals, by personal faith in Jesus Christ and by a life of devotion. Christianity, in contrast both to its Jewish origins and to the prevailing attitudes of contemporary Roman society, was therefore able to devalue the family and to make the individual the primary unit of society.[268] Women in Christian Rome, as well as their male counterparts, were for the first time viewed apart from their families.[269]

No better proof of this devaluation of the family by Christianity exists than in the twin cults of chastity and virginity. Again, the origins of these cults can be found in the teachings of Jesus Christ and were re-emphasized by Saint Paul and the early Christian fathers.[270] Many women and men embraced this ideal in the fourth and fifth centuries, thus rejecting the traditional family unit, and yet still retained the admiration of society.[271] Women were

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[267](cont'd) Example of Roman Women", *Church History* 45 [1976], 149-65).

[268]The only possible dissent from this view I found was Gaudement, who in "Tendances", p. 206, writes: "Assez curieusement nous avons constaté et un renforcement des solidarités familiales et un progrès de l'individualisme".

[269]So extreme was this in some that the lifestyle of St. Melania the Elder was held up as an example for others, although she abandoned her young son, Publicola, in Rome, "when she went on pilgrimage to Egypt and Palestine, not to return West until Publicola himself had a daughter of marriagable age." (Clark, *Melania*, p. 84).

[270]For Jesus' ideas on virginity and chastity, see Mt. 19:10-12. For an analytical examination of the teachings of Jesus and the early Christian church fathers. including heretical sects, see, "Early Christianity: A Sex-Negative Religion", chapter 8 of *Sexual Variance in Society and History*, by Vern Bullough [Chicago: University of Chicago Press, 1976], pp. 175-201.

[271]St. Augustine wrote that "thousands of young men and

able for the first time in Roman history to win prestige even if they separated themselves from their families.[272] We will see below that many laws were created in later Roman society out of respect for these revolutionary ideals of sexual abstinence.[273]

Obviously, Christians could not do away completely with marriage, despite the reluctance of some Christian teachers to admit this.[274] Sexual purity, then, was advocated for

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[271](cont'd) maidens contemn marriage and live in chastity". (*Of True Religion*, Trans. by L. O. Mink [South Bend, IN: Gateway Editions, 1953], p. 7). Ancyra alone was said to have 10,000 virgins. Herlihy, *Households*, p. 21. Early in his career, the heresiarch Arius is said to have numbered among his followers 700 virgins. Gibbon, p. 393. R. Etienne, who attempts a statistical analysis on the number of celibate persons of the time, offers an astounding rate of 31.8% for members of imperial families, and 23.6% in senatorial families. " La Démographie" in *Transformations et conflits au IVe siècle ap. J.-C.* [Bonn: Rudolf Habelt Verlag, 1978], p. 137.

[272]As Jo Ann McNamara ("Wives and Widows in Early Christian Thought", *International Journal of Women's Studies* II:6 [1979], p. 576) writes: "the Christian ideal of virginity offered a unique autonomy to women who abdicated their fundamental responsibilities."

[273]Although many men considered the purity of women irreconcilable with the nature of womanhood. See *Idem* ("Sexual Equality", p. 146) who writes of "a predisposition among early Christians to denigrate the very nature of women." For example, Gerontius wrote of St. Melania the Younger: In truth, she [St. Melania] had been detached from the female nature and had acquired a masculine disposition, or rather, a heavenly one" (Clark, *Melania*, p. 54). St. Augustine adds: "Women too have some virile quality whereby they can subdue feminine pleasures, and serve Christ and govern desire" (*Of True Religion*, p. 76). Clement of Alexandria writes: "is not a woman translated into man, when she is become equally unfeminine, and manly, and perfect?" (Laporte, *Role of Women*, p. 31). For an extended analysis of this point, see Rosemary Radford Ruether, "Misogynism". Note that Augustine personified Continence as a woman (*Confessions*, p. 176) and Boethius Philosophy (*The Consolation of Philosophy*, Penguin Books [Aylesbury, U.K.: Hazell Watson and Viney, 1969]). This may have been mere conformity to grammar.

[274]"The use of marriage was permitted only to his [Adam's]

those who did remain within the family.[275] Christian legislators therefore attempted to enforce this standard of purity on family members, and they differed from Roman tradition by enforcing the sexual restrictions on both men and women.[276]

Of the laws in the Theodosian Code arising out of Christian belief, almost all serve to regulate the sexual lives of women by promoting these two ideals: first, to encourage sexual abstinence, and second, to encourage purity in those involved in sexual relationships.[277]

Because Christianity had such firm beliefs on the conduct of human lives and here especially women's lives, its ideology was bound to touch many aspects of women's economic and social lives. It is a testimony to the strength of Christian conviction that in most areas where the

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[274](cont'd) fallen posterity as a necessary expedient to continue the human species and as a restraint, however imperfect, on the natural licentiousness of desire. The hesitation of the orthodox casuists on this interesting subject betrays the perplexity of men unwilling to approve an institution which they were compelled to tolerate" (Gibbon, *Decline*, p. 288. See 1 Cor. 7:25-28, 34. St. Paulinus of Nola also urged a young married couple to live together chastely (Clark, *Melania*, p. 144).

[275]See 1 Cor. 5:9-13; 1 Cor. 6:18-20; Eph. 5:5. St. John Chrysostom advocated an early age of marriage "on moral grounds" (Laistner, *Christianity*, p. 78).

[276]See Herlihy, *Households*, p. 11.

[277]"From the second millenium B.C. forward control over the sexual behavior of citizens has been a major means of social control in every state society." (Lerner, *Creation*, p. 216). Michel Foucault, in *The History of Sexuality*, trans. by R. Hurley, Vintage Books [New York: Random House, 1978], explains on a theoretical level the need for laws on sex: "power prescribes an "order" for sex that operates at the same time as a form of intelligibility: sex is to be deciphered on the basis of its relation to the law." (Vol. I, p. 83).

precepts of Christianity conflicted with the economic or social practicalities of late Roman life, the Christian precepts almost always conquered. In other areas Christianity reaffirmed measures designed to end economic difficulties or implement social change. Laws which served this dual purpose: the ideals of Christianity and the practicalities of late Roman society, form the greatest part of laws dealing with women in the Theodosian Code. It is these laws which we will now examine.

A. Christian Belief and the Labour Shortage

The Christian emphasis on sexual abstinence only encouraged the population decline in later Roman society. One might therefore think that there would be little in Christian belief compatible with efforts to combat the labour shortage. But in a few areas, the two did agree, and the emperors were able to promulgate laws which both agreed with their Christian conscience and which promoted the growth of the population.

Infanticide was an ancient Roman custom: its discouragement and then criminalization can be seen as promoting both the Christian worth of the individual and the increase of population.[278] Its effects not only on the lives

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[278] Justin Martyr thought that infanticide was very common (Pomeroy, *Goddesses*, p. 165). He may have been right, as the economic climate made rearing children more and more difficult. Of course, infanticide had long been condemned by Church fathers and Church councils (Gaudemet, "Transformations", p. 74). Herlihy (*Households*, p. 19) believes girls were more readily abandoned than boys, but Rawson (*The Family in Ancient Rome: New Perspectives*

of daughters but of mothers as well is obvious. First, Constantine[279] indirectly discouraged it by first offering food and clothing to parents who could not afford to raise their children, especially their newborn infants (C. Th. 11.27.1; 11.27.2).[280] Second, Constantine offered incentives to persons claiming abandoned children: 1) that they could decide whether to raise the foundling as their child or as their slave (C. Th. 5.9.1), 2) that natural parents later wishing to reclaim the children they had abandoned would have to pay the equivalent of a slave price (C.Th. 5.10.1).[281] Later in the fourth century (A. D. 374),

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[278](cont'd) [Ithaca, NY: Cornell University Press, 1986], p. 18) disputes this, finding no evidence for many fewer women than men.

[279]Constantine legislated a great deal on Christian morality, especially in sexual ethics, which is probably one of the most substantial proofs of his personal conversion to Christianity (on the debate see A. A. Vasiliev, *History of the Byzantine Empire: 324 - 1453*, [Madison, WS: University of Wisconsin Press, 1952] Vol. I, pp. 45-50; or C. B. Coleman, *Constantine the Great and Christianity* [New York: Ams Press, 1914], pp. 20-23). A. Alfoeldi (*The Conversion of Constantine and Pagan Rome* [Oxford: Clarendon Press, 1948], p. 30) and André Piganiol (*L'empéreur Constantin*, [Paris: Editions Rieder, 1932], p. 196) see clearly the imprint of Christian morality on Constantine's laws, while A. H. M Jones (*Constantine and the Conversion of Europe*, [London: Hodder and Stoughton, 1948] p. 231) does not.

[280]The first law was issued for Italy, the second for Africa. Others may have been issued in other provinces. Poverty was likely a good reason for infanticide. St. Melania the younger was moved by the number of children she saw in extreme poverty (Clark, *Melania*, p. 74). St. Ambrose wrote compassionately of the same situation (Gaudemet, "Tendances", p. 203).

[281]Jones (*Constantine*, p. 231) writes: "in this he was doubtless inspired by the example of the Church, though there was precedent for such measures in the pagan empire of the second century." The obligation of the natural parents to pay a fee in order to retrieve children abandoned by them was apparently an old Roman legal debate (Rawson, *Family*, p. 172).

Valentinian, Valens, and Gratian decreed that: "If anyone, man or woman, should commit the crime of killing [*necare*] an infant, such an evil deed shall constitute a capital offense." (C. Th. 9.14.1).[282] Obviously, however, the practice continued, because in the fifth century, laws were still being established for those claiming abandoned children: in this case, that those finding children register the finding with their local bishop so as to cement their claim to the child (C. Th. 5.9.2).[283] If the child abandoned had originally been a slave, the old master was required to pay the new one twice the purchase price of the child plus the expenses of maintenance if he wished to reclaim the slave (Sirm. 5). Thus, although infanticide may have continued because of poverty, abandoned children seem likely to have been raised by others, considering they would have provided additional labour, and brought with them imperial benefits.[284]

The later Roman emperors also encouraged marriage within proper Christian contexts as a way of encouraging the birthrate. In one law it is expressly said that marriage is

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[282]Pharr, p. 236. Schultz (*Classical*, p. 151) considers in this case the killing to mean the abandonment of children, and so this law made infanticide illegal. Yet its title is "De Sicariis" together with adult murders. Pharr believes it applied to cultic killings of children.

[283]The contemporary Romance of Longus perserves in novel-form the story of two foundlings exposed as infants but found and raised (Glover, *Life and Letters*, p. 372).

[284]"There is some reason likewise to believe that great numbers of infants who, according to the inhuman practice of the times, had been exposed by their parents, were frequently rescued from death, baptized, educated, and maintained by the piety of the Christians and at the expense of the public treasure." (Gibbon, *Decline*, p. 304).

for those women not strong enough to embrace celibacy:

> For with great efforts must young maidens avoid and pass by the allurements of human desire, to which the ardor of youthful age especially impels them. (N. Maj. 6.1).[285]

Laws in the Theodosian Code, although reinforcing the superiority of the single over the married life,[286] emphasized respect for the individual as paramount in a marriage.

Laws from the Theodosian Code emphasized the indissolubility of marriage.[287] Families were not to be split up, even if it were economically possible for this to be done; this included families of *coloni* or slaves.[288] Even

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[285]Pharr, p. 555. Compare 1 Cor. 7:34. Also, "Saint Jean Chrysostome... estime que, dans l'état actuel de l'humanité, l'institution matrimoniale a pour but principal de porter remède à la concupiscence; à ses yeux, elle n'est qu'un port de refuge destiné aux ames trop tentées ou trop faibles." (Anné, "Conclusion" p. 518). This recognition of women's sexual desires is usually considered modern, but even Nestorius, when condemning Pulcheria's supposed numerous sexual excounters, called this "weakness typical of a young woman" (Holum, *Empresses*, p. 153.

[286]According to St. Jerome: "the difference, then, between marriage and virginity is as great as that between not sinning and doing well, nay rather, to speak less harshly, as great as between good and better" (Gerard J. Campbell, "St. Jerome's Attitude Toward Marriage and Women", *American Ecclesiastical Review*, 143 [1960], p. 313). And St. John Chrysostom: "Raise up an athlete for Christ! I do mean by this, hold him back from wedlock... I wish for this and used to pray that all might embrace it [monastic life]; but as it seems to be too heavy a burden, I do not insist upon it." (*Vainglory*, p. 95). Tertullian wrote "that marriage is of the essence of fornication" (Laporte, *Role of Women*, p. 24).

[287]This, according to Gaudemet ("Tendances", p. 199) was one of the most assuredly Christian of the new legal ideas. Since marriage was regarded by many Christians as the equivalent of slavery, this is not surprising. St Paul compared the two: Eph. 5:22 ff. 6:5. St. Monica served her husband as a slave and considered it her duty as a wife (*Confessions*, IX, 19; Grimal, "Femme", pp. 480-2).

[288]Gide calls the indissolubility of marriage one of the three major changes of later Roman law (*Etude*, p. 185).

in the case of a *colonus* who had escaped from his rightful master and married a *colona* from a different master, a substitute had to be returned to the original master, rather than the escaped man himself (C. Th. 5.18.1; N. Val. 31.1).[289] Even families of imperial slaves had the security of knowing they could not be split up (C. Th. 2.25.1).[290] Moreover, soldiers on active duty were allowed (with imperial persmission) to have their wives and children join them (C. Th. 7.1.3).[291] This legislation was thus able both to satisfy Christian sensibilities and to allow certain families to produce more children than previously they would have been able to do.

The late Roman emphasis on the indissolubility of marriage also meant an end to divorce.[292] In the classical period, divorce had been the only feasible method for a women to gain control of her life, as we have seen, although divorce brought monetary penalties. Under Constantine and his successors, anxious to promote a Christian view of

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[289]This substitution was called *commutatio*.

[290]This law likely applied only imperial slaves so as not to usurp authority from the senatorial, slave-owning class. See above, page 90, note 247.

[291]Some years later, Julian was still moved by the sight of the wives of soldiers pleading with their infants in their arms to remain with their husbands, and allowed them to accompany the troops to the border (Gibbon, *Decline*, pp. 440-1).

[292]According to St. John Chrysostom: "Le divorce est un attentat à la fois à la nature et à la majesté de Dieu; à la nature, parce qu'il mutile une même chair; à la majesté de Dieu, parce qu'il détruit l'indissolubilité du mariage voulue par Dieu.' Grégoire le Grand déclare dans plusieurs de ses lettres qu'on ne peut séparer des époux parce qu'ils sont devenus une chair. La même doctrine est enseignée par les Constitutions apostoliques, par saint Léon le Grand et par saint Ambroise." (Anné, "Conclusion", pp. 518-9).

marriage, divorce was regarded suspiciously.[293] From a demographic standpoint, divorce is also only positive if remarriage is also encouraged, and it certainly was not in Christian Rome.[294] For reasons, therefore, both Christian and demographic, divorce could not be tolerated.

It was one of Constantine's most significant laws which put an end to divorce "for a trivial charge (*levi obiectione*)".[295] Thenceforth, a woman was only allowed to divorce her husband for charges of homicide, sorcery, or tomb robbery (*dissolutio*); and for these crimes he forfeited his right to her dowry and was also deprived of the right to remarry. If he did she could claim the second wife's dowry. The wife is specifically denied the right to divorce him for drunkenness, gambling, or philandery (*mulierculario*).[296] A husband was likewise forbidden to repudiate his wife except for her adultery, sorcery, or procurement. Her punishment for these crimes, as tradition decreed, was loss of her dowry and any gifts, and deportation to an island (C. Th. 3.16.1). With this one law, Constantine eliminated a tradition of Roman family life, that of a commonplace and easily obtained divorce. Indeed, he changed the very nature of divorce, from a right to a punishment only for serious

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[293]For Jesus' views on divorce see : Mt. 5:31-32; Mt. 19:1-9; Mk. 10:1-12.
[294]See below, pages 118 to 122.
[295]Pharr, p. 77.
[296]Does this mean his sexual infidelity, since it was not a crime? Or does it mean just flirtatiousness, as Corbett (*Marriage*, p. 244) believes. The latter would have been quite difficult to define.

offence.[297]

Constantine's law on divorce was apparently upheld for most of the later empire.[298] A law of 421 clarifies the divorce laws in cases where the official charges needed for divorce could not be proven, but the couple had separated. A women who had left her husband but was unable to prove his criminality lost her dowry and gifts and was deported. She also lost the right to "remarry"; if she lived with another man, her husband could prosecute her for adultery.[299] In contrast, if a man left his wife for unofficial reasons (the example given is because of her frivolity), he had to return her dowry but could keep her gifts, and could remarry after two years. A husband who deserted his wife "because of a mere disagreement or out of "mental discord", and for no other substantial reasons, lost his right to remarry, but the wife deserted by him might remarry after one year of separation (C. Th. 3.16.2). This law probably gives us a glimpse at the reality of divorce in the lives of Romans of the fourth and fifth centuries. Such legislation probably became necessary because of a number of "unofficial" divorces,[300] and subsequent "unofficial" remarriages. In

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[297]None of these laws could of course affect the divorce by mutual consent (Jones, *Decline*, p. 336).

[298]But this is not certain. N. Th. 12.1 implies other laws on divorce, and "Saint Augustin impute à l'empéreur païen Julien L'Apostat' le rétablissement de la pleine liberté du divorce." (Gaudemet, *Droit*, p. 28).

[299]The church also punished her. According to the Council of Elvira, "la femme, qui a abandonné sans motif son mari, pour en épouser un autre, est privée de la communion même *in articulo mortis* (can. 8)" (Anné, "Conclusion", p. 545).

[300]Called *bona gratia* or *communi consensu* (Corbett,

spite of their Christian consciences, later Roman women perhaps rebelled at the restrictions of Christian teaching on divorce, as decreed by Constantine.[301]

As further proof of this rebellion against the indissolubility of marriage, a novel of Theodosius II directly repudiates Constantine's style of divorce and dares to return to the more liberal attitudes ofthe classical empire. In fact, Theodosius justifies the reversal, saying " it is harsh to exceed the regulations of the ancient laws." Therefore, he adds:

> ...by this our contitution We decree that the blame for divorce and the punishments for such blame shall be recalled to the ancient laws and the responses of the jurisprudents... (N. Th. 12.1)[302]

One wonders whether there was a rash of divorces after this law. But the freer attitude was not to last, for it was abrogated a dozen years later by a novel of Valentinian III, for a return to Constantine's law. This emperor gives as his motive:

> ...for the benefit of the bond of reverence or marriages themselves, and in order that marriages may not be commonly and rashly abandoned, We annul the recent law which permitted marriages to be dissolved by the adverse wish alone of the parties... (N. Val. 35.1)[303]

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[300](cont'd) *Marriage*, p. 245); Jones (*Empire*, p. 974) also attests to this.

[301]"Les mésures très restrictives prises par Constantin à l'égard du divorce dépassaient sans doute ce que la société romaine était capable d'accepter. Dès la fin du siècle, il fallut ouvrir plus largement la possibilité du divorce." (Gaudemet, "Transformations", p. 80).

[302]Pharr, p. 498. A law of A. D. 439. The law also implies that some persons left their spouses without even a notice of divorce.

[303]*Ibid.*, p. 547. A law of A. D. 452.

Constantine's law on divorce, despite its definite break with tradition and its unpopularity, had the strength of Christian conviction and was thus allowed to remain.

Laws on infanticide and the indissolubility of marriage were enacted as a way of bringing Roman law into line with the dictates of Christianity. The above laws, in addition, prompted the badly needed population growth, an advantage which certainly was not ignored by their creators.

B. Christian Belief and the Economic Crisis

Laws created to deal with the economic crisis were forced to grant taxation benefits for the sake of the aristocracy, as well as to clarify laws on economic issues in order to circumvent lengthy financial battles, in light of the decline of jurisprudence. The Christian emperors found, however, that in both of these areas, laws could equally promote these economic considerations and the new ideals of sexual purity. There are some laws, therefore, which regulate both family economic politics and family sexual politics.

The exact legal status of married women had been a problem to Romans since the start of the imperial period, since in part they entered their husband's family, in part they remained in their father's family. For wives of the members of certain classes, marriage brought an automatic shift to their husband's status. But in these hard economic times, the status of each person in the empire had to be

clarified so that the system of taxation would run as smoothly as possible.

An early law keeps the distinction between husband and wife, according to Roman tradition. For example, Valentinian and Valens decreed that even though ship masters are able to obtain tax benefits, their wives were obliged to remain on the tax lists in the status in which they were born (C. Th. 13.5.12).[304] Later, however, perhaps with the influence of Christian ideas on the unity of married persons, Valentinian II and Theodosius I ordered that all women were to be considered as having the same status as their husbands (C. Th. 2.1.7). This clarified what had been increasingly a tradition in Roman marriage, but in fact ran opposite to Augustus' laws on marriage. In spite of this, Theodosius' grandsons obliged the wife and children of a man who had freed himself from his ignoble status and obligations to remain with the obligations and in the lower status (C. Th. 10.20.16), presumably for the added tax revenue.

The Christian legislators protected the sacredness of marriage by keeping all financial assets of a family within the sexually "pure" family, that is, between legitimate spouses and children. Thus, for those Christians who required sexual outlet, both ideology and economics would see to it that they expressed their sexuality within the

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[304]This must have been a difficult decision, since the shipmasters were responsible for carrying the "corn and other public cargoes to Rome and the base ports of the army", and were therefore an influential guild (Jones, *Decline*, p. 36).

context of a proper marriage. This was done by giving financial incentives and penalties.

Most significantly, inheritances by *fideicommissum* (*hereditas commissa tacitae fidei*) were absolutely forbidden. Anyone who received an inheritance of this nature was obliged to report this, and then was only allowed to receive one-third of the bequest. Even a wife was obligated to report any *fideicommissa* from her late husband, and could only retain half (C. Th. 10.11.1).[305] The *fideicommissum*, originally a loop-hole to circumvent Roman inheritance laws, was blocked by Constantine so that he and his successors could more effectively regulate legacies.

Another Roman economic tradition, the *lex Papia Poppaea* of Augustus, had limited inheritances between a childless husband and wife to one-tenth of their estate. This, however, did not correspond to the Christian idea that a man and a woman, married, were one flesh. Constantine originally exempted shipmasters from the Papian law as a way of encouraging them in this important profession. Thus he decreed:

> ...even if no children should be born to them, husbands shall take the entire inheritance in accordance with the testament of their wives, and to the wives shall come the entire will of their husbands. (C. Th. 13.5.7).[306]

This law thus made both moral and economic sense. In the fifth century, Honorius and Theodosius II extended the

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[305]This double penalty, penalizing someone even if they reported the crime, would presumably also deter the person making the bequest.

[306]Pharr, p. 392.

exemption from the Papian law to all spouses, and thus completely repealed Augustus' legislation (C. Th. 8.17.2). Any married persons were thenceforth free to leave in a will as much as they wanted to their spouse.[307]

In cases of intestate spouses, at first, Arcadius and Honorius declared that the *responsa prudentium*, as well as the *lex naturae* made the woman's blood relatives her heirs and not her husband (C Th. 4.21.1). Later, Theodosius II and Valentinian III allowed intestate spouses to pass their estates to the other spouse "if near kinsmen should be entirely lacking" (C. Th. 5.1.9).[308] Still later, Valentinian III allowed the estates of intestate spouses to be given to the remaining spouse if the claimant had witnesses that this had been the wish of the deceased (N. Val. 21.1).[309] Thus, a progression can be witnessed toward greater recognition of the real bond between a wife and her husband.

Constantine, in keeping with his desire to keep estates within the legitimate, sexually "pure" family, confirmed the traditional law granting mothers a share (one-quarter) of

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[307]The advantages of the new law are parodied in Gibbon's description of the greed of childless couples: "The art of obtaining the signature of a favourable testament, and sometimes hastening the moment of its execution, is perfectly understood; and it has happened that in the same house, though in different apartments, a husband and a wife, with the laudable design of overreaching each other, have summoned their respective lawyers to declare at the same time their mutual but contradictory intentions." (*Decline*, p. 598).

[308]Pharr, p. 106.

[309]In the law is one such case, involving a couple named Leonius and Jucunda.

their deceased children's property. If they did not receive this share, they could commence legal action to have the court set aside their child's testament. Likewise, children were all granted a share of their parents' wills, with legal recourse if they were omitted (C. Th. 2.19.1; 2.19.2). By these laws, women as mothers and daughters were obliged in economic matters to recognize their bonds within the family.

Family concerns prompted the emperors not only to exclude the fisc from inheritance in favour of the family, but also the Christian churches or their members. Obviously, the concern was not to prevent bequests to the "real" church, but in this period of multiple heresies, that imposters should not inherit. Women were considered particularly vulnerable to this. Women were forbidden to leave inheritances to any man not related to them, including "Ecclesiastics, ex-ecclesiastics, and those men who wish to be called by the name of Continents" (C. Th. 16.2.20).[310] Only the estates of women who died intestate and without close relatives, and who owed nothing to a municipal council or a patron could be awarded to the Church or to a cell of holy women (C. Th. 5.3.1).

Christian legislators, also to ensure that only proper forms of marriage were allowed, included economic incentives to keep all properties and monies within the legitimate family.[311] Laws of this nature promoted the Christian ideals

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[310] *Ibid.*, p. 433.

[311] A related trend may also be noted at this time away from the extended family towards the nuclear family.

of marriage as a sacred institution beyond procreation. Because these laws also helped to cement the power and riches of the aristocratic families by keeping all the money and property within the family, they also promoted economic prosperity, for the upper classes which wielded the political power if not for the lower classes.

C. Christian Belief and the Decline of *Patria Potestas*

The Christian emphasis on the individual corresponded ideologically with the declining power of the father in the family. We have already seen that both in theory and in practice, the father's authority over other members of the family, in particular over female members, was neglected by the later Romans. Laws by the Christian emperors further weakened the *patria potestas*, already in decline, by their paramount concern for the rights of children.[312] Fortunately for women no distinction was drawn between sons and daughters in the granting of rights to children. Unfortunately for women, the restrictions placed on marriage for the sake of children often fell more heavily on the wives than on the husbands.

The growing power of the legitimate children of a marriage worked with Christian sensibilities to prohibit or

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[312]For Jesus' ideas on children see: Mt. 18:1-10; Mt. 19:13-15; Mk. 9:35-37; p. Mk. 10:13-14; Lk. 18:15-17. For St. Paul's ideas on children see Eph. 6:1-4. Generally on the connection between the rise of Christianity and the decline of *patria potestas* see M. Troplong, *De l'influence du christianisme sur le droit romain*, [Paris: L. Hachette, 1912], chapter IX "La puissance paternelle".

discourage other forms of sexual relationships,[313] for example concubinage or second marriages. The legitimate children of a man were able to withhold any inheritance from their illegitimate siblings,[314] and the children of a first marriage were able to withhold any of their inheritance from their siblings from the subsequent marriage.

Consideration for children by the imperial legislators is evident from a number of laws, often in areas (concubinage, divorce, remarriage) strictly dealing with the adult couple alone. In one instance, it is written:

> For the consideration of children demands that the dissolution of marriage be more difficult. (N. Th. 12.1).[315]

Both Christian theorists and legitimate children had reasons for their disapproval of concubinage. To Christian leaders it smacked of fornication, despite past Roman liberality.[316] Legitimate children saw it as eroding their inheritance rights. Thus Constantine, although not

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[313]Foucault (*Sexuality*, Vol. I, p. 106) writes: "relations of sex gave rise, in every society, to *deployment of alliance* [*sic*]: a system of marriage, of fixation and development of kinship ties, of transmission of names and possessions.... The deployment of alliance is built around a system of rules defining the permitted and the forbidden, the licit and the illicit... the deployment of alliance is firmly tied to the economy due to the role it can play in the transmission or circulation of wealth".

[314]Before Constantine, legitimate and illegitimate children might receive equally from their parents (Troplong, *Influence*, p. 244).

[315]Pharr, p. 498.

[316]Although St. Augustine, who had personal experience with concubinage, seems self-forgiving when reminiscing about his concubine, saying "she was the only one and I was faithful to her." (*Confessions*, p. 72). And the Council of Toledo allowed a concubine to an unmarried man (Jones, *Empire*, p. 973).

forbidding the state of concubinage itself, forbade any financial benefits or benefits of status from the liaison.[317] His decree, because of its detailed description of the types of lower-class women in late Roman society, is worth quoting at length:

> It is our pleasure that Senators or persons of rank of Most Perfect or those adorned with the honors of the duumvirate or the quinquennalitate in the municipalities or with the honor of flamen or of the civil priesthood of a province shall... [be punished if] they wish to consider as legitimate *the children* born to them of a slave woman, a daughter of a slave woman, a freedwoman, the daughter of a freedwoman, whether made a Roman or a Latin, a woman of the stage, a daughter of a woman of the stage, a mistress of a tavern, a daughter of a tavern keeper, a low and degraded woman, the daughter of a procurer or of a gladiator or a woman who has charge of wares for sale to the public. Thus if a father should give anything to such children, whether he calls them legitimate or natural, all such property shall be taken from them and restored to his legitimate offspring, or to his brother or sister or father or mother. (C. Th. 4.6.3) (my emphasis)[318]

Further in the law these same men are forbidden also to give anything to the women themselves, but the order of consideration, children first, is noteworthy. That this remained in effect is probable, considering that over a hundred years later a novel refers to the same law, when

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[317]Although Constantine's mother Helena is generally believed to have been the concubine of his father, Constantius, previously betrothed to Theodora, Maximian's step-daughter (Balsdon, *Roman Women*, p. 165).

[318]Pharr, p. 86. This law was eventually repealed by Justinian, who wished to marry an actress, Theodora. If Constantine's mother, Helena, was indeed the daughter of a tavern-keeper, as she is assumed to have been (Jones, *Constantine*, p. 14), then by his own law, Constantine made himself illegitimate. In addition, it is believed that Constantius Chlorus was also previously engaged to another woman before taking Helena, which would also make the union illegal. Constantine treated his rival's illegitimate son quite differently (C. Th. 4.6.2).

trying to remove the ambiguity from the phrase "a low and degraded woman" (N. Marc. 4.1). This law effectly removed the possibility of "marriage" between a high-born man and a low-born woman by removing the possibility of any economic support for her by him.

Both Christian leaders and legitimate children were anxious to see that illegitimate children were totally excluded from rights of inheritance.[319] In the same year as the above law on concubinage, Constantine ordered that any bequests made to illegitimate children either be given to the legitimate children, or if there were none, to close relatives, or failing them, to the imperial treasury. None could be left to illegitimate children (C. Th. 4.6.2). During the Valentinian dynasty, however, the law was amended, allowing one-twelfth of an estate to be given to illegitimate children even if there were legitimate ones (C. Th. 4.6.4).[320] There was apparent dissatisfaction with this arrangement as well, for Arcadius and Honorius rescinded it in favour of the former (C. Th. 4.6.5). Yet within a decade, they had again allowed the Valentinian law to stand (C. Th. 4.6.6). Finally, Theodosius II and Valentinian III allowed illegitimate children to accept as much as one-eighth of their father's estate (C. Th. 4.6.7).

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[319]For exceptions on decurions, see above, pages 59 to 61. Also by way of exception, Constantine allowed children of a concubine to become legitimate if their parents subsequently married (Buckland, *Text-Book*, p. 129). For this, the parents would have to be eligible for marriage.

[320]One-quarter if there were no legitimate children.

This series of laws only seems to contradict my argument for the growing power of legitimate children. The last law of Theodosius II and Valentinian III gave as its definition of illegitimate children "the result of a lawful union without an honorable performance of the marriage ceremony." (C. Th. 4.6.7).[321] The word "lawful" is significant, since bigamy (one lawful wife, one concubine) was certainly not. These laws must refer to the offspring of what are called "private marriages".[322] In this case, the last of these laws indicates the growing acceptance of Christian ideas of equality (that marriage can be lawful, if monogamous, between high-born men and low-born women). The point is worth considering.

Late Roman laws also show a general discouragement of remarriage. This position is in keeping with Christian ideology,[323] but runs counter to classical imperial policy.[324] By discouraging remarriage, legislators of the fourth and fifth century not only put Christian ideals into practice, but were able also to promote the rights of

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[321]Pharr, p. 87.

[322]St. Augustine "held that true wedlock could exist without a ceremony." (Bullough, *Sexual Variance*, p. 194).

[323]See 1 Cor. 7:10-11. According to Humbert (*Remariage*, pp. 326-34), the reasons for the Christian church's disapproval of remarriage were three: 1) "La consécration à Dieu par une pieuse continence", 2) "Le souvenir du défunt", and 3) a "souci des enfants du premier lit, dont les intérêts sont menacés par le remariage d'un de leurs parents".

[324]See *Ibid.*, p. 378. Sometimes even contemporary imperial policy countermanded this also. Honorius wished his sister Galla Placidia to remarry, "and much against her will gave her to [a general], Constantius." (Oost, *Galla Placidia*, p. 142). Did her reluctance arise in part from the opprobrium attached to remarriage?

children over their parents' property, especially their mother's dowry.[325] Conversely, the discouragement of remarriage restricted adult women in the disposition of their dowries.

That remarriage in late Roman society was discouraged by legislators is undeniable.[326] The right to remarry was often lost as a punishment in cases of divorce, as we have seen, for women who left their husbands for unofficial, trivial reasons (C. Th. 3.16.2). Sometimes the right to remarry was only temporarily removed. For example, a woman who divorced her husband for official reasons was obliged to wait for five years before remarrying (C. Th. 3.16.2).[327] Gender inequality is quite evident from this law, for by it, men who divorced their wives lost the right to remarry only for two years if for unofficial reasons, and not at all if for official reasons (C. Th. 3.16.2). In these cases,

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[325]According to Troplong (*Influence*, p. 190), "je constate un fait capital: l'avènement de l'intérêt des enfants dans l'organisation du système des secondes noces, intéret méconnu jusqu'à ce jour, et mis en lumière par les idées chrétiennes." As Corbett writes: "the second union is treated as a dishonour to the offspring of the first." (*Marriage*, p. 251).

[326]"Origine encore écrit: 'Non seulement la fornication, mais les secondes noces excluent des dignités ecclesiastiques.'" (Jean Daniélou, "Le ministère des femmes dans l'Eglise ancienne", *Maison-Dieu: Revue de pastorale lituguque* 61 [1960], p. 81). Tertullian felt the same (*Ibid.*).

[327]According to a law of Julian (extant in the *Digest* of Justinian, 24.2.6) a woman also had to wait five years if her husband had been captured by foreigners in war before remarrying. This replaced Constantine's law stipulating a delay of four years, and only if the woman had made attempts to locate her husband (*Corpus* of Justinian, 5.17.7). Justinian considered captivity never to end a marriage (Corbett, *Marriage*, pp. 212-7).

refusal of permission to remarry was meted out as a punishment, but when a woman wished to remarry after the death of her husband, a delay was also demanded. In part this assured the court that the woman was not pregnant, since children born posthumously had equal rights with the rest of their siblings. In part, though, it also assured a proper mourning period by the woman for her husband, and so the law had both a financial and a moral purpose. Punishment was severe for infractions; and the emperors decreed that in the case of a woman who remarried before one year had passed from her first husband's death:

> ...she shall be branded with the marks of disgrace and deprived of both the dignity and rights of a person of honorable and noble status. (C. Th. 3.8.1)[328]

In addition, she lost all rights to any gifts or inheritances she had previously received from her late husband (C. Th. 3.8.1).

Sometimes the punishments associated with remarriage were even more arbitrary. Women who wished to act as legal guardians for their children had to promise never to remarry (C. Th. 3.17.4), although there were provisions if they changed their minds. Also, remarried mothers were denied the right to revoke gifts from "undutiful children", which other mothers had (C. Th. 8.13.1; 8.13.4).[329]

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[328]Pharr, p. 71.

[329]Humbert does suggest a reasoning behind the laws, that it "reflète l'hostilité du législateur dans son appréciation du remariage des mères. Convaincu que la mère, en se remariant, ne respecte pas l'affection qu'elle doit à ses enfants, le législateur admet que les enfants puissent à leur tour ne pas respecter leurs devoirs de piété filiale." (*Remariage*,

But in general, the discouragement of remarriage, while partly rooted in Christian belief, emerges as a result of the growing power of children over their inheritance. The fact that all but one of these restrictive laws concern women who remarry is, of course, significant.[330] A woman who remarried had to leave one-quarter of her dowry to her children at her death, and could not validly give all of it to her second husband (C. Th. 2.21.2). She could not alienate any of her inheritance from her previous husband, but had only usufruct (C. Th. 3.8.2; 3.8.3). If she had been left only usufruct of an estate, by her remarriage she forfeited even that to her children (C. Th. 3.9.1).[331] Moreover, her share of the estate of her deceased children of the first marriage might not be alienated, and had to go at her death to the other children of that first marriage (C. Th. 3.8.2; 5.1.8).

As for fathers who remarried, they are generally absent from these laws. The legislation of Gratian, Valentinian, and Theodosius even recognizes this without seeking to correct it. It is written:

It is Our Will that husbands also shall be

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[329](cont'd) p. 389).

[330]The remaining law allows men who remarry only to be in charge of their children's maternal inheritance until they are of legal age (C. Th. 8.18.3).

[331]Humbert remarks: "Plutôt qu'une mesure destinée à protéger les intérets patrimoniaux des enfants, heritiers en nue-propriété des biens de leur père, la perte de l'usufruit est prononcée directement contre le remariage de la veuve." (*Remariage*, p. 391). He continues: "cette peine frappe exclusivement les mères remariées, signe de la sollicitude de la loi pour les enfants nés du premier lit." (*Ibid.*, p. 392).

> admonished by a similar example of both piety and law... what is enjoined upon mothers by the necessity of the law, as here set forth, is more readily expected of them [fathers] in consideration of justice... (C. Th. 3.8.2)[332]

By a novel of Theodosius II, this was changed, and all laws dealing with the remarriage of women were applied equally to the remarriage of men (N. Th. 14.1).

Despite the proscription of religion and the discouragement of law, this continued legislation on remarriage points to its survival in society. One may presume, however, that its incidence greatly decreased during the Christian era of the Roman empire. And the discouragement of remarriage, with the discouragement of concubinage and of illegitimacy, attest both to the strength of the new religion and to the decline of the father's authority in family affairs, even for controlling his own sexual habits.

D. Christian Belief and Roman Tradition

Although Christian teachings have been characterized above as generally conflicting with the tenets of Roman antiquity, there are cases where the two opposing cultures found common ground. There was, first, a desire to protect women as more fragile than men, and second, an encouragement of respect by daughters for their parents, and third, above all, a desire for sexual purity in sexually active (read married) women, by the expectation of virginity before

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[332]Pharr, p. 71.

marriage, by an abhorrence of incest, and by an avoidance of adultery. In these areas, the new religion also upheld the past.

Protection for women's delicacy sometimes took the form of placing them in a position above that of men. For instance, Constantine forbade any civil official to drag a matron (*materfamilias*) out of her home for payment of debts. This special privilege is accorded to her, he writes: "out of consideration for her sex" (C. Th. 1.22.1).[333] Likewise, another law of Constantine specifies different penalties for either sex in the crime of counterfeiting money (C. Th. 9.21.1). Although the differences are not given, it is assumed that the women's was lesser. Women were guaranteed separate housing if they were imprisoned (C. Th. 9.3.3).[334] In such instances, the protection offered to women could be an asset.

Especially beneficial to women were the laws protecting them from wrongdoing in marriage preparations. For example, if a man became engaged to a girl or woman but did not marry her, she could, after two years, break off her engagement with impunity (C. Th. 3.5.4). This applied even if the man was a soldier on active duty (C. Th. 3.5.5). Also within marriage, laws strove to protect the woman from entrance into marriage through coercion. Thus if a man tried to force a woman into marrying him, even going so far as to get a

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[333] *Ibid.*, p. 30.

[334] Women were also separated from men by a curtain on a crowded ship, according to Synesius (Glover, *Life and Letters*, p. 331).

rescript from the emperor (unwittingly) ordering her to marry him; this man was severely punished (C. Th. 3.10.1). If the governor of a province should try to use his authority to force marriage upon a woman, he was also punished (C. Th. 3.6.1; 3.11.1). The principle of female protection was so important to fifth century legislators that they even forbade parents to consecrate their daughter to virginity before the age of reason, in case she later decided to marry (N. Maj. 6.1).[335] In inheritance, too, the protective attitude toward women could be beneficial, as when it allowed daughters of conspirators plotting the deaths of senators to accept one-quarter of their father's estates, although their brothers were not allowed to accept anything (C. Th. 9.14.3).

However beneficial some of the effects might have been, protection for women generally resulted from the attitude that women, especially minor women, were intellectually inferior to men. In one law, Constantine exempts minor women from his law on betrothal gifts because women, he writes, "are ignorant of the law" (C. Th. 3.5.3). Constantine did allow minor women, if married, to sell from their resources, in a law no longer extant, but Julian revoked this, and

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[335]Was this law for demographic reasons? It offers a contrast with most Christian theorists, for example St. Paul (1 Cor. 7:36-38). St. Jerome also gave parents advice on how best to raise their daughters so they would want to enter the religious life (Laistner, *Christianity*, p. 35). Political considerations could also supersede the law. Pulcheria, sister to Theodosius II, took a vow of virginity for herself and on behalf of her two young sisters, aged approximately thirteen and ten (Holum, *Empresses*, p. 93).

invalidated any such sale by women (C. Th. 3.1.3). Under Valentinian and Valens, widowed women under twenty-five years of age who wished to remarry needed to consent of their fathers, or if he were dead, their male relatives (C. Th. 3.7.1)[7]. The special, protected position of women was a two-edged sword.

Both Christianity and Roman tradition demanded respect by daughters of their parents.[336] Of course, parricide was condemned (C. Th. 9.15.1).[337] Daughters and sons who were neglectful of their parents could forfeit any gifts they had received from their mothers (C. Th. 8.13.1; 8.13.4) or their fathers (C. Th. 8.13.2; 8.13.6), and even stood to lose their independence if emancipated (C. Th. 8.14.1).[338] And neither a woman nor her *tutor* or *curator* could alter decisions made by her marriage (C. Th. 3.5.12).

Uppermost in the minds of Christian men of the fourth and fifth centuries, as it had been in the minds of Roman men throughout history, was the sexual purity of their women. Christianity differed significantly in requiring the same quality of its men. For a woman, this sexual purity meant that if she chose to be sexually active, she could

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[336]"*Honora patrem tuum, sed si te a vero Patre non separet*, dit Saint Jérome." (Gaudemet, "Transformations", p. 75). The Council of Gangras anathemized children who neglected their aged parents (canon 16; *Ibid.*, p. 75). The pilgrim Aetheria describes how during the baptismal rite in Palestine (and perhaps elsewhere) both male and female applicants had to affirm that they were obedient to their parents (Laistner, *Christianity*, p. 40).

[337]Punishment was particularly gruesome: to be sown into a sack with snakes and then thrown into water.

[338]This may have been revoked by a later, lost law (see Pharr, p. 216, note 1).

have sexual relations only with her husband in a proper marriage. Thus, for example, a *tutor* was responsible for seeing that his female ward was still a virgin before marriage (C. Th. 9.8.1).

Laws prohibited incest for the sake of sexual purity. Incest had been generally condemned in both Roman and Christian traditions,[339] but certain areas were clarified. First, marriage between a niece and her uncle, either maternal or paternal, was condemned, returning to an ancient Roman practice abandoned in the early empire (C. Th. 3.12.1).[340] Second, marriage between a man and his brother's wife, or his former wife's sister was also condemned (C. Th. 3.12.2).[341] This was in contrast to earlier Jewish traditions, but in line with later Jewish and Christian traditions.[342] Economically, this is significant in its reduction of possible confusion in family inheritances.[343]

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[339]See Gaudemet, "Tendances", pp. 197-8, for a discussion of the Roman and Christian roots of the late Roman prohibitions of incest. Or see Troplong, *Influence*, chapter V, "Des empêchements pour parenté".

[340]The husband in such a marriage was condemned to death.

[341]St. Paul also condemned marriage between a woman and her step-son (1 Cor. 5:1-2), although this is not repeated in late Roman legislation.

[342]St. Basil also condemned this (Gide, *Etude*, p. 186). In spite of these prohibitions, the emperor Honorius married two sisters, Maria and Thermantia. Contemporaries did consider the marriage incestuous, and after one year, Thermantia, still a virgin, was repudiated (Oost, *Galla Placidia*, pp. 70-81). Note that no mention is made of a woman who married two brothers. A contemporary story, of Clitophon and Leucippe, by Achilles Tatius, records sympathetically two first cousins who married (Glover, *Life and Letters*, pp. 370-1).

[343]"By broadening the incest prohibition (eventually to seven degrees), it [the Church] prevented the great propertied families from conserving their patrimonies through endogamy - the marriage of close relatives and

Socially, the law supported the clear distinctions of family and familial relations which were so important.[344] Third, incestuous marriages were again completely condemned by a law of Arcadius and Honorius, but they reduced the penalty for them from death and forfeiture of all property to confiscation of the dowry to the fisc, and disallowance of gifts or legacies between "spouses" or to children (C. Th. 3.12.3). Incestuous marriages continued, for first cousins sought (unsuccessfully) imperial dispensation for marriage still in the fifth century (C. Th. 3.10.1). Still, public (or imperial) opinion was such that when some criminals were freed at Easter, committers of incest were not (C. Th. 9.38.6; 9.38.8).[345] That incest continued despite the proscriptions may be attributed to the strength of family politics, so financial penalties were probably well directed.

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[343](cont'd) common heirs. Heirless owners were allegedly more likely to give their holdings to the Church." This interpretation of Jack Goody is quoted by Herlihy (*Households*, p. 61) who disagrees. See footnote below.

[344]"One idea for this policy [against incest/endogamy] may have been the concentration of women in the households of the rich and powerful, to the deprivation of other sectors of society. The Church's insistence on exogamy must have forced a freer, wider circulation of women through society." (Herlihy, *Households*, p. 61).

[345]Laws of Gratian, Valentinian II, and Theodosius. "These laws prove conclusively Valentinian's personal Christianity" according to N. Q. King (*The Emperor Theodosius and the Establishment of Christianity* [London: SCM Press, 1961], p. 109, n. 1). King adds: "We may suppose that Easter amnesties were greater in number even than those which survive." (*Ibid.*, p. 110). Jones (*Empire*, p. 522) claims that they became regular after 385, and adds: "The need for such an institution is a confession of the deficiencies of Roman criminal justice."

The severity of punishments for adultery testify to the importance of sexual purity for Roman women. The abhorrence of adultery was well in keeping with the traditions both of Roman law and Christian teaching.[346] But in spite of Christian teaching that sexual purity was required equally of a husband as of a wife, by Roman law, adultery remained a female crime, that is, the key to the crime was the marital status of the woman, or, in other words, only a married woman, or a man with a married woman, could commit it.[347] Constantine and his successors continued the strict penalties for adultery.[348] At first, no appeals were granted for adulterers (*sacrilegi nuptiarum*) (C. Th. 11.36.1; 11.36.4),[349] later, only if the court had confessions and witnesses (C. Th. 11.36.7). Soldiers could not be excused from charges of adultery by claiming military prerogative (C. Th. 9.7.9).[350] Torture of household slaves was permitted

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[346]Sts. Epiphanus (*Haeres*, LIX.4) and Basil (*Ep. ad Amphilochium*, 9) favoured divorce for adultery (Gide, *Etude*, p. 175). St. Augustine's mother counselled him "not to commit fornication and above all not to seduce any man's wife." (*Confessions*, p. 46). The Council of Elvira set punishments for adultery at five years penance for a single act of adultery (canon 69) and ten years for living in adultery (canon 68) (Anné, "Conclusion", p. 545).

[347]Corbett, *Marriage*, p. 141; Gaudemet, "Tendances" p. 201. St. Augustine did not seem too concerned by his father's adultery: "He was unfaithful to her, but her patience was so great that his infidelity never became a cause of quarelling between them." (*Confessions*, p. 194). In contrast, St. Jerome thought that adultery should be punished in both sexes (Bridel, *Femme*, p. 92; see also Gaudemet, *Droit*, p. 37).

[348]In fact, the post-classical period witnessed the extension of punishments for adultery to concubines and fiancées in addition to wives (Corbett, *Marriage*, p. 139).

[349]Does *sacrilegi* include members of both sexes?

[350]The fact that the emperors made this unpopular decision with soldiers is significant, since they all relied heavily

in cases of adultery (C. Th. 9.7.4). Adultery had to be punished always as a criminal offence, and never as a civil offence, for example, disguised under a suit for the recovery of a dowry (C. Th. 9.7.7).[351] And if new evidence were found in a case of adultery, even persons acquitted could be retried (C. Th. 9.7.8).

The penalty for adultery for both sexes was death.[352] Constantius and Constans, linking adultery to parricide, prescribed a similar execution: to be sown into a leather sack and burnt alive (C. Th. 11.36.4).[353] Perhaps over the years, the death sentence was commuted to imprisonment, for we have examples of adulterers in the prisons (C. Th. 9.38.4; 9.38.6; 9.38.7; 9.38.8; Sirm. 8).[354] But after the mid-fifth century, lesser punishments than death were disallowed, as in the case of a certain Ambrosius, whose sentence was changed from exile to execution, in an extant example included as a precedent (N. Maj. 9.1).

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[350](cont'd) on the support of the military.

[351]Even Constantine's own son Crispus may have been executed for allegedly committing adultery with his stepmother Fausta (Jones, *Decline*, p. 48).

[352]Corbett, *Marriage*, p. 146. Even Theodosius II, who according to Socrates never had executed any criminal regardless of the crime, sentenced Paulinus to death for alleged adultery with his wife (Cameron, "The Empress", p. 266).

[353]Although sometimes the suspects died during torture. "Jerome tells a terrible story of a man and a woman who were accused of adultery. The man confessed under torture. Encouraged by this partial success the judge tortured the woman until she died." (Jones, *Decline*, p. 195).

[354]At Easter when many of the prisoners were released, adulterers were kept in chains. See above, footnote 345. Another of these laws (C. Th. 9.38.1) excluded adulterers from a general pardon granted to all criminals at the occasion of the birth of a child to Constantine's son Crispus and Crispus' wife Helena.

Still, adultery was not always punished as strictly as before. Constantine restricted to close relatives (husbands, full brothers, fathers, paternal uncles, and paternal cousins) the right to accuse a woman of adultery (C. Th. 9.7.2). This law, much different in tone from Augustus' on the subject, gives eloquent testimony to the view that adultery was an offence by a woman against her male kin. Charges of adultery were also restricted to the upper classes, for Constantine ignored accusations of adultery among the lowest classes of women:

> If the mistress of a tavern, that is, the wife of a tavern keeper, should be found in adultery, she can be accused; but if her maidservant or a woman who gives service in the tavern should be apprehended in adultery, she shall be acquitted in consideration of her mean status. (C. Th. 9.7.1)[355]

It is interesting that some women were not considered "worthy" of adultery. Charges of adultery were also strictly personal, and so any legal action against the morals of a wife had to be cancelled if either she or her husband died during the proceedings (C. Th. 3.13.1).

The sexual purity of women was one subject upon which both Christian and Roman traditions could agree. Together with a protected status for women, and woman's attitudes toward her parents, they provided a bridge between the old and the new.[356] The retention of these ancient ideals also

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[355]Pharr, p. 231.

[356]It goes almost without saying that murder by a woman of her husband remained a crime, and the Code mentions the prosecution of one woman for just that, one Severina of Picenum (N. Maj. 5.1). Torture of one's household slaves was also permitted in murder investigations (C. Th. 9.7.4).

slowed the rate of change in the status of women in this era of rapid improvements.

VII. THE IMPORTANCE OF CHRISTIAN IDEOLOGY TO THE POSITION OF LATE ROMAN WOMEN

Obviously, then, Christianity and its ideals were in many ways compatible with other late Roman trends, and this probably explains in part its popularity. Christianity interacted with the important economic and social changes of the period to engender the large number of laws we have examined on the status of women. But women were also affected by laws which arose solely out of Christian belief and which make sense only in a Christian context. As we might expect from laws on women coming out of Christian teaching, most of them regulate women's sexuality, trying to uphold the twin sexual virtues proposed for women of sexual abstinence or sexual purity. The picture which emerges from this is a simple one: rewards for those who upheld these virtues and punishments for those who did not.

Constantine and his successors reserved the greatest rewards for those women who embraced the Christian ideal of chastity.[357] One of Constantine's most important laws, and one of his earliest, was his removal of the penalties for unmarried and childless persons (C. Th. 8.16.1).[358] This law demonstrates his willingness to replace the Roman tradition of women as family members with the Christian belief in women as individuals, and thus anticipates the corresponding

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[357]Glover (*Life and Letters*, p. 127) writes: "it was in virginity that women's great opportunity seemed to lie."
[358]The tremendous losses to the imperial treasury by this law were offset, according to Jones (*Empire*, p. 421) with penalties on inheritance meted out to Manicheans and other heretics.

greater independence of women.[359]

Protection and respect were especially accorded by the Christian emperors to those women who chose to be chaste while still virgins.[360] First, they are protected from any man who would destroy their vow by rape (C. Th. 9.25.1) or by seduction (C. Th. 9.25.2; 9.25.3).[361] These holy virgins were also rewarded financially for their dedication by exemption from the plebeian capitation tax (C. Th. 13.10.4; 13.10.6).[362] Their distinctive dress was reserved only for them (C. Th. 15.7.12).[363] And their independence from the family was asserted in laws which allowed them to circumvent the legal principles established to keep family finances

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[359]Yet, Christian ideas of womanhood never allowed women to take positions of authority over men. See 1 Tim. 2:12-3. Tertullian wrote that women were not permitted to speak in church, nor to teach, baptise, make offerings, neither to lay claim to any part of the functions of a man, nor the priestly ministry (*Virg. Vel.* 19.1; quoted in Daniélou, "Ministère", p. 79). The Marcionites apparently did not refuse women these functions (*Ibid*). Collyridian heretics also allowed women to be priests (*Ibid.*, p. 90).

[360]On women and monasticism, Clark, writes: "in the 350s and 360s noble women began to adopt asceticism" in growing numbers, and that "women were the primary diffusers of the ascetic ideal in Rome." Examples include Pope Damasus' sister Irene, Ambrose's sister Marcellina, Asella and Lea, friends of Jerome, and St. Melania the Younger (*Melania*, pp. 93-4). On the ceremony of virginal consecration, which closely resembled the betrothal ceremony (cf. *sponsa Christi*), see Raymond d'Izarny, "Mariage et consécration virginale au IVe siècle", *Vie spirituelle* 24 [1952], 92-107; 26 [1962], 477-89.

[361]C. Th. 9.25.3 promises immunity to the accuser if the charge should be proven false, and prosecutes even attempted rape or seduction, both contrary to Roman practice.

[362]According to Sozomen, Julian removed this exemption, which does not seem surprising (Glover, *Life and Letters*, p. 67).

[363]Especially the veil given to them to wear in public as the special symbol of their vow (d'Izarny, "Mariage", p. 103).

within the family. In fact, virgins were given the freedom to leave by will their entire estate to whatever religious person or cause, to "a church, a martyry, a cleric, a monk, or to the poor" (N. Marc. 5.1.).[364] Even if a woman consecrated to God died intestate, her estate would pass, if she had no close relatives, to her monastery (C. Th. 5.3.1).[365]

Because women were discouraged from remarrying, widows were enjoined to take up the vow of perpetual chastity for the sake of religion.[366] This is so much the case that if a widow had no children, popular (or at least imperial) opinion expected her to take a vow of chastity.[367] A novel of Majorian decrees:

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[364]Pharr, p. 566. Although much contact with men was not appreciated. It was said of St. Martin of Tours: "One very scrupulous virgin point-blank refused to see Martin... and Martin praised her for her modesty." (Glover, *Life and Letters*, pp. 299-300). Martin said he had only once allowed a woman to minister to him, and with her husband present (*Ibid*). Conversely, the biographer of St. Athanasius tells of the saint's exile, when he sought an overnight hiding place with a twenty-year old virgin of great beauty, in all purity (Gibbon, *Decline*, p. 427). On Marcian and laws on women, see below, page 137, note 373.

[365]Except the estates of *colonae*. Also in classical law, it was impossible to bequeath to activities or uncertain groups (almsgiving to the poor, or a monastery, for example), but only to actual persons, so this law is remarkable for two reasons (Buckland, *Text-Book*, p. 178). See C. Th. 16.2.4 for the law allowing the Church to accept bequests from Christians.

[366]See 1 Cor. 7:39-40; 1 Tim. 5:3-16. Daniélou posits in the primitive church an actual order of widows, parallel to the other ministerial orders. Their religious duties included: prayer, care of the sick, and fasting. The institution declined after the mid-third century, and disappeared after the close of the fourth century ("Ministère", pp. 82-3).

[367]Or sometimes she herself anticipated it. St. Melania the Younger, at the death of her children, rejoiced that she might more easily serve God now "relieved of so great a burden" (Glover, *Life and Letters*, p. 130).

> We are deeply disturbed by the obstinacy of widows who have borne no offspring and who condemn their own fecundity and the renewal of their family by repudiating a repetition of marriage, since they do not choose a solitary life in order that they may cherish their chastity out of love for religion, but they seek after the courtship of power by the fortunes of their childlessness and their widowhood and they choose a lascivious freedom of living. (N. Maj. 6.1).[368]

This novel records in a fascinating way the discrepancy between ideal and actual widowhood in the fifth century, and helps us to move away from too theoretical a viewpoint of these women. Women, it seems, were still enjoying personal independence. The serious nature of this accusation was such that Majorian ordered all childless widows under forty years of age to remarry within five years of their husbands' death or forfeit half of their estate, and in so doing transgressed Christian ideas on remarriage and on chastity.

The Christian emperors before Majorian had offered special protection and respect for holy widows.[369] As with holy virgins, they were especially protected from rape (C.

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[368]Pharr, pp. 555-6. This is similar to the words of Jerome: "avoid these too, whom necessity, and not their choice, has made widows - not that they should have wished their husbands to die, but that they did not gladly catch at the chance of a life of purity." (Glover, *Life and Letters*, p. 128). Canon 72 of the Council of Elvira punished a widow who had been caught in sexual misconduct with at least five years without communion, and in some cases excommunication even until her death (Anné, "Conclusion", p. 544).

[369]"Le législateur chrétien souligne à son tour les trois avantages du veuvage: par respect de la continence, les lois d'Auguste sont abrogées et le remariage des jeunes veuves entouré de précautions; la mémoire du défunt inspire une nouvelle politique du deuil; et l'intérêt des enfants, par des mesures propres aux seules mères remariées, entraine le législateur à prononcer contre elles des peines ou des déchéances dont la finalité est d'écarter le remariage dans l'intérêt des enfants." (Humbert, *Remariage*, p. 360).

Th. 9.25.1; 9.25.2), and were exempted from the plebeian capitation tax (C. Th. 13.10.4; 13.10.6).[370] When the emperor Constantine legislated penalties for owners of estates where money was being counterfeited, widows were granted indulgences from charges of complicity normally laid against landowners who lived nearby (C. Th. 9.21.4). In cases where appeals were made directly to the emperor, while all others were obliged to appear before him, widows did not have to leave their provinces (C. Th. 1.22.2).[371] In making legacies, however, widows were not given the freedom of the virgins. At first, wishing probably to protect them from persuasive charlatans, "Ecclesiastics, ex-ecclesiastics, and those men who wished to be called by the name of Continents" were forbidden to enter the home of a widow under pretext of religion, and the widows were forbidden to leave any part of their legacies to these men (C. Th. 16.2.20).[372] Later, because of the appeal of one Hypatia, they were granted this right (N. Marc. 5.1). This is one of the best examples of greater independence granted to women as a reward for sexual purity. In this case, legislators gave religious widows

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[370]As with virgins, Julian removed these special exemptions, according to Sozomen (Glover, *Life and Letters*, p. 67).

[371]Minors and other such persons were also granted this favour.

[372]Pharr, p. 443. The social abuses which led to the creation of this law are described by Gibbon (*Decline*, pp. 483-4). St. Melania the Younger, nevertheless, had sufficient contact with a certain priest Gerontius for him to call her his spiritual mother (Clark, *Melania*, p. 13). Still, the practice was regarded suspiciously. "Cyprian long ago had written against the practice, and Jerome fulminated against it still." (Glover, *Life and Letters* p. 299). See also Jones, *Empire*, p. 151.

complete freedom to dispose of their wealth.[373] Widows who became deaconesses were given much the same regard given to all lower clerics.[374] Deaconesses were required to be at least sixty years of age, with children at home (C. Th. 16.2.27).[375] Concern was also shown by the legislators for these children of deaconesses. If they were minors, they had to be supplied with a *curator* (as well as a *tutor*?) and at first, they could be the sole heirs of their mother (C. Th. 16.2.27). Soon afterward, however, deaconesses were granted the same rights of bequest as virgins: that is, they could will their estate to clerics if they wished (C. Th. 16.2.28),[376] or to any religious person or cause (N. Marc. 5.1). If they died intestate and without close kin, their estates would pass to their church (C. Th. 5.3.1).

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[373]That this is a law of Marcian is not surprising: Marcian was controlled to a great extent in religious matters by his semi-wife Pulcheria. As a virgin, Pulcheria had particular independence, and her influence in imperial decision-making is well established (see especially Holum, *Empresses*, chapter III "Aelia Pulcheria Augusta").

[374]See 1 Tim. 2:11. Deaconesses assisted the male clergy with ritual functions which concerned women (Daniélou, "Ministère", p. 79). This consisted mainly in home visits to and baptisms of women (*Ibid.*, p. 85). Perhaps they also presided at weddings (Anné, "Conclusion", p. 534. See also J. G. Davies, "Deacons, Deaconesses and the Minor Orders in the Patristic Period", *The Journal of Ecclesiastical History*, XIV [1963], p. 6).

[375]See 1 Tim. 5:9 on the age restriction for deaconesses. The second restriction is more obscure. King (*Theodosius*, p. 114, n. 1) writes: "'*Cui votiva domi proles sit*', literally '*to whom there is the desired progeny at home*'. It is difficult to understand whether the '*nisi*' governs this - *Cod. Just.* 1:3:9 omits it... The meaning seems to be that she must be over sixty and have heirs at home."

[376]Jones (*Empire*, p. 166) claims that complaints by St. Ambrose of Milan (*Ep.* 18:13) pressured Theodosius into rescinding this law.

Another group of potentially holy women were the wives of clerics, but their position was becoming ambiguous. With the contemporary push for clerical celibacy, they were becoming in the fifth century an unwanted group. Distinction was drawn between men who married before becoming clerics, and men who married afterwards, and this distinction was carried over to their wives, who were generally respected if they married these men before clerical ordination, and despised for it afterward.[377] A law of Honorius and Theodosius II clearly retains this polarity. It begins:

> It is not seemly that a man who lives a commendable life of stern discipline in this world should be tarnished by the association of a so-called "sister". If any person, therefore, relies upon any rank whatever in the priesthood, or is distinguished by the honor of the clergy, he shall know that consorting with extraneous women is forbidden to him. (C. Th. 16.2.44)[378]

Yet, the same law continues in a much different tone in regard to wives taken before ordination. It states:

> Chaste affection, moreover, demands that those women who obtained lawful marriage before their husbands assumed the priesthood should not be deserted; for those women who have made their husbands worthy of the priesthood by their association are not unsuitably joined to clerics. (C. Th. 16.2.44).[379]

It may be said of the wives of clerics perhaps that although they were generally unwanted from a theoretical standpoint, they were appreciated from a practical one. Early in the

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[377]Eventually all married clergy were banned in the west, but clerics in the east who were married before ordination were permitted. The debate (not to mention enforcement) of clerical celibacy continued for centuries.

[378]Pharr, p. 448. Were the priests forbidden sexual relations with their wives? (Humbert, *Remariage*, pp. 365-6).

[379]Pharr, p. 448. Pharr believes this to be the influence of Pulcheria.

period, Constantius and Constans rewarded wives of clerics for their service, by granting them tax exemptions from public services, trade taxes, maintenance tax for postwagons, etc. (C. Th. 16.2.10; 16.2.14). These women were closely linked to their husbands, both in their duties and in consideration by the law.[380]

As mentioned above, the force of Christianity within late Roman legislation was such that the emperors created laws not only to reward sexual purity in women, but also to punish sexual immorality. Of course, women had been punished for this since the beginnings of Roman society, and we have examined two areas in particular, adultery and incest. The area which the Christians of Rome saw fit to add to that was prostitution.[381]

Prostitution had not been illegal in the Roman empire. Although unmarried women were forbidden to engage in casual sexual relations (*stuprum*), women could, by registering themselves as prostitutes in the civil courts, escape prosecution for this. Prostitution was always an extremely low-status position, but a legal one. The effect of

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[380]One further group of religious women, not mentioned in the Theodosian Code but given great respect was that of pilgrim. Examples include the two Melanias, Egeria (Aetheria) and Silvia of Aquitaine. On the latter, and on female pilgrims in general, see E. D. Hunt, "St. Silvia of Aquitaine: The Role of A Theodosian Pilgrim in the Society of East and West", *Journal of Theological Studies*, n. s. XXIII:2 (October, 1972), 351-73.

[381]Surprisingly, female homosexual acts are not condemned, although St. Paul did condemn them, and male ones were condemned twice in the Code (C. Th. 9.7.3; 9.7.6). See John Boswell, *Christianity, Homosexuality and Social Tolerance* (Chicago: University of Chicago Press, 19), pp. 123-4, for an alternate view of these laws.

Christian legislation on prostitution was not, as might be imagined, to criminalize it, but rather to emphasize the sinfulness of prostitutes and to prevent them from ever elevating their status.[382]

It should be noted that the profession of actress (*scaenica, thymelica*) in the Roman empire of the fourth and fifth centuries was associated with, and perhaps synonymous with, that of prostitute, as being both "for public amusement". A law included with the others on prostitution also deals with female musicians, and female harpists in particular, restricting them in their dealings with individual men (C. Th. 15.7.10), so this profession was probably also linked with prostitution.[383]

By numerous laws, actresses/prostitutes were chained to their professions. The service was implied to be hereditary (C. Th. 15.7.4; 15.7.9), although partly personal as well.[384] Valentinian, Valens, and Gratian promise to:

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[382]Indeed, the Christian emperors even continued to collect the chrysargyron, the tax on trade, from prostitutes, throughout the fourth and fifth centuries (Jones, *Decline*, p. 162). "The Christian emperors were torn between their secular duty of keeping up the supply of entertainers for their subjects and their Christian duty of at least permitting actors and actresses to save their souls." (*Idem*, *Empire*, p. 1020).

[383]Could this be related to the Greek tradition of the hetaira? Note the Greek origins of the terms for actress. Female dancers appear as well to have been associated with such evil women. In the contemporary story of Xanthippe and Polyxena, the devil appears to Xanthippe in the guise of a female dancer (Glover, *Life and Letters*, p. 377). And Jerome thought that Christian girls should never hear musical instruments (Yarbrough, "Christianization", p. 163). As to numbers of prostitutes, Gibbon reckoned about three thousand each of dancers and singers in Rome (*Decline*, p. 603).

[384]Lot (*The End*, p. 104) thought it to be hereditary.

> ...protect the daughters of men and women of the stage from the fraud and despoliation of disturbers, provided that they so conduct themselves that they should be considered as worthy persons. For it is just that only such daughters of men and women of the stage should be recalled to the theatre who appear to be living and to have lived a vulgar life in their manner of living and in their morals. (C. Th. 15.7.2).[385]

A fine of five pounds of gold was levied against anyone who would remove an actress from the city of her service (C. Th. 15.7.5). Even actresses previously freed from their compulsory duties by imperial decree were forced to return to these duties, "so that the usual display cannot be absent from public amusements and on festal days." (C. Th. 15.7.13).[386]

Gradually, it seems, legislators became uneasy with the idea of the direct prostitution of women, as hereditary, and men were punished for the corruption of women under their control. At first, prostitutes who were Christian were granted special privileges:

> If any man should wish to subject to wantonness the women who are known to have dedicated themselves to the veneration of the holy Christian law and if he should provide that such women should be sold to brothels and compelled to perform the vile service of prostituted virtue, no other person shall have the right to buy [*coemere*] such women except either those who are known to be ecclesiastics or those who are shown to be Christian men [*homines*], upon the payment of the proper price. (C. Th. 15.8.1)[387]

Later, two laws release any woman from obligations to a man who would attempt to prostitute her. If he is her father, he

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[385]Pharr, p. 433.
[386]*Ibid.*, p. 435.
[387]*Ibid.*, p. 435.

forfeits his *potestas* over her, and if he is her master, she is freed. (C. Th. 15.8.2; N. Th. 18.1).[388]

Prostitutes and actresses would, in any case, have had difficulty in leaving their professions. Men of good reputation, as mentioned above, were forbidden to leave their estates to these women (C. Th. 4.6.3),[389] which effectively prevented women from leaving this lifestyle through marriage. In their daily lives as well, prostitutes and actresses were limited in their social contact by their appearance. They were forbidden to wear the gems, or certain patterns of silk, or gilded textiles of respectable women, but were restricted to checkered or varicoloured silks and gold jewellery without gems (C. Th. 15.7.11).[390] They were, of course, especially forbidden to mimic the dress of the holy virgins (C. Th. 15.7.12).[391] Finally, prostitutes and actresses were denied access to the public seats (C. Th.

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[388]The former law prescribes a punishment for the man of exile to the public mines; the latter law prescribes flogging and exile from his city.

[389]This law is quoted at length above, page 116.

[390]Yet St. John Chrysostom, in comparing the spirit of evil to a harlot, describes her thus: "encircled by a golden girdle and with curls on her head tastefully plaited in the Persian fashion; and [with]... a circlet about her head, enhancing the beauty of her uncovered tresses, and displaying flashing gold *and precious gems* about her throat" (*Vainglory*, p. 86; emphasis added).

[391]In general, clothing seemed to be an important symbol to late Roman women. St. Melania the Younger renounced silk dress in grief at the death of her infant son, and after vowing to live chastely in her marriage, exhorted her husband to renounce fine clothing as well (Clark, *Melania*, pp. 30-2). St. John Chysostom, Tertullian, and St. Clement also denounced sumptuous female garb (Laistner, *Christianity*, pp. 44-6. See also C. Th. 14.10 for more sumptuary laws).

15.13.1).[392]

The only means open to such women to leave their professions was by entrance into an ascetic life. This was certainly difficult for them to enter slowly, for as actresses, they were cut off from the sacraments while in their profession, (C. Th. 15.7.1)[393] and holy women were forbidden to have contact with them (C. Th. 15.7.12).[394] But through the vow of chastity, whereby she replaced her sexual immorality with sexual purity, an actress was allowed an escape (C. Th. 15.7.1; 15.7.4; 15.7.8; 15.7.9). This vow was irreversible, and woe to the woman who betrayed it:

> But if she [the ex-prostitute] thereafter is involved in indecent embraces and is detected to have betrayed the religion which she sought, and if she carries on the profession that she had officially abandoned and remains a woman of the stage in spirit, she shall be dragged back to the stage, and without hope of any absolution she shall remain there, until, a ridiculous old woman, unsightly through old age, she cannot, indeed, even then receive absolution, although she could not then be anything else than chaste. (C. Th. 15.7.8)[395]

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[392]At the public games, which "comprised chariot races, mimes, wild beast hunts and, in fourth-century Rome, gladiatorial combats" (Jones, *Decline*, p. 235). Actors and tavern-keepers were also forbidden use of these seats.

[393]St. John Chrysostom praised one prostitute, who entering a church where the bishop Nonnius was speaking, was converted to asceticism (Zoya Pavlovskis, "The Life of St. Pelagia the Harlot: Hagiographic Adaptation of Pagan Romance", *Classical Folia*, XXX [1976], 138-49).

[394]The original says "thymelici", and Pharr believes that only men of the stage were forbidden to have contact with holy women.

[395]Pharr, p. 434. According to St. Augustine, since chastity was better than, but analagous to marriage, a woman who lapsed on this vow was considered as having committed worse than adultery, or if she married, worse than bigamy (Gaudemet, "Saint-Augustin et le manquement au voeu de virginité", *Annales de la Faculté de Droit d'Aix-en-Provence* n.s. 43 [n.d.]). And yet, "Prostitution continued to

So ran one law. The highest contempt was apparently reserved for women who abandoned their sexual purity.[396]

The Christian emperors also made rape a serious criminal offence, since it destroyed a woman's sexual purity.[397] As we have previously mentioned, the rape of a holy virgin or widow was especially abhorred (C. Th. 9.25.1; 9.25.2; 9.25.3; Sirm. 10; N. Maj. 6.1), for these women had vowed themselves to chastity. But the rape of any woman was an affront to Christian morals more because of the sexual nature of the crime than because of its violence. The punishment for a man who raped a woman was death, and if he were a slave, death by burning (C. Th. 9.24.2). This sentence was to be carried out uniformly, and there could be no special clemency even if the man was a senator (C. Th. 9.1.1), or a member of the secret service (C. Th. 2.1.3). As well, some of the general rights of citizens were waived in the case of trials for rape: no appeals were allowed, parents of the woman could be exiled if they had tried to

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[395](cont'd) flourish openly." (Jones, *Decline*, p. 335).

[396]Nestorius "put an end to female participation in evening psalms and prayer and in watches for the dead, claiming that this led to promiscuity." (Holum, *Empresses*, p. 152). Presumably it was the late hours these women kept and not the activities themselves which were the cause. As for Licinius, although not Christian, "in the interests of morality, he forbade men and women to worship together, and prohibited bishops from instructing women" (Jones, *Constantine*, p. 130).

[397]There were no penalties in classical law for rape, claims Gaudemet ("Tendances", p. 195). This is doubtful, although Gaius, for example mentions only physical assault (*injuria*) to a woman, and not rape specifically. As such, rape seems to have been a private offense, and so its evolution into a public offence is the change (*Institutiones*, ed. by F. de Zulueta, Vol. I [Oxford: Clarendon Press, 1946, p 226).

cover up the crime, assistants or accomplices to crime were also executed without regard for gender (C. Th. 9.24.1),[398] also, the charge could still be laid even if the two parties involved had subsequently married (C. Th. 9.24.3). We know that the emperors felt the crime serious enough not to release rapists when they annually released most criminals at Easter (C. Th. 9.38.3; 9.38.4; 9.38.6; 9.38.8; Sirm. 8).[399] Perhaps this represents an overall view.

But the rape of a woman was seen as such an offence against her sexual purity that in the eyes of these legislators, she must also be at least partially punished. The law of Constantine the Great on the rape of women spells this view out. This emperor rightly makes a distinction between seduction and rape, but, as the following quotation records, punishes the woman for both:[400]

> If willing agreement is discovered in the girl, she shall be punished with the same severity as her ravisher, [and] since impunity must not be granted even to those girls who are ravished against their will, when they could have kept themselves chaste at home up to the time of marriage and when, if the doors were broken by the audacity of the ravisher, the girls could have obtained the aid of neighbors by their cries and could have defended themselves by all their efforts. But We impose a lighter penalty

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[398]If the woman's nursemaid had been involved in her rape, she was to be executed by having molten lead poured down her throat.

[399]See above, page 127, footnote 345.

[400]See Lot (*The End*, p. 98): "these terrible penalties show a ruler [Constantine] who is desirous of fighting against the corruption of society at any cost." Below, he adds: "It was offenses against chastity that roused his most inexorable and most terrible wrath; he seemed more enraged by outrages to morality and religion than careful to preserve the order and rights of civil society. His edicts against adultery and rape breathe the hatred of an avenger rather than the prudence of the head of an Empire."

> on these girls, and We command that only the right of succession to their parents shall be denied them. (C. Th. 9.24.1).[401]

Since the raped woman was regarded not as the victim of violence but as sexually impure, it seemed only logical to the emperor that she lose some of her rights.[402]

Laws, therefore, which attempted to address the status of women in the later Roman empire from a Christian perspective, concerned themselves with the sexual purity of women, as we have seen in matters concerning the vows of virginity, chastity, and celibacy, and attitudes toward prostitution and rape.[403] In this obsession with women's sexual morality, the Christian emperors were being faithful to the values of the contemporary and the early Christian church, if not to the message of Jesus. They also reaffirmed the traditions of Roman society, and of patriarchal

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[401]Pharr, p. 245. The Church also punished the woman who was seduced. At the Council of Elvira, a penance of one year was meted out to her if she married her lover, or of five years if she marrried another man. As Anné explains, "Aux yeux des Pères du concile, les relations sexuelles établissent donc entre les complices l''unité de la chair' et elles créent quasi une obligation de fidelité, au point que la coupable, en se livrant à un autre, commet, en quelque sorte, un péché d'adultère." ("Conclusion", p. 544).

[402]With like mind, the Church Council of Ancyra (314) decided that if a betrothed woman had been abducted and raped but eventually returned, her fiancé had the right to break off the engagement without suffering church penalties (Anné, "Conclusion", pp. 547-8).

[403]In related matters of sexual purity, intermarriage was forbidden between Christians and Jews, punishable significantly as adultery (C. Th. 3.7.2; 9.7.5) Even the low class of women from the weaving establishments were protected from Jews leading them "into the association of their turpitude", under pain of death (C. Th. 16.8.6; Pharr, p. 467.). Romans were likewise forbidden to marry barbarians, but we have so many examples of this (cf. Honorius, Arcadius) that it must have been ridiculous even from the start (C. Th. 3.14.1).

societies in general, in which restricting the sexual activities of women, and to a lesser degree, the sexual activities of men, is an important bulwark of culture.

The beliefs of the Christian church, as earlier mentioned, were one of the most profound influences in late Roman society. The examination in these chapters of the laws dealing with women in the fourth and fifth centuries proves that for women, the influence of Christianity was the most important social change in the fourth and fifth centuries.[404] There were, as documented above, many factors involved in legal changes for women, but the overwhelming majority seem to have been motivated by Christian ideas.[405] The ideology of Christianity freed Roman women of the fourth and fifth centuries from the strict ideological confines of the family in which they had always lived. The sacrifice it demanded was their sexual freedom: Christianity demanded sexual purity from its women. The discouragement of extramarital relationships, of divorce, and of remarriage, although protested, took from women some of their ability to make decisions in their sexual lives. For a more complete

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[404]"La religion chrétienne eut sans doute marché beaucoup plus vite dans le droit civil [que dans le droit pénal]." (Troplong, *Influence*, p. 3). On the strength of Christianity, he writes, "les resistences auxquelles cette législation se heurta (exposition des nouveaux-nés, vente des enfants, divorce, etc) soulignent les difficultés que le christianisme eut a vaincre." (*Ibid.*, p. 84). But, he adds: "Tant il est vrai que le christianisme était désormais le mobile des grandes améliorations sociales." (*Ibid.*, p. 129).

[405]Compare with Gaudemet ("Tendances", p. 194): "Un trait frappe tout d'abord: la relative conformité des réformes législatives de Constantin et de ses successeurs aux principes moraux que prônait le christianisme."

view of the effects of ideology on women in the fourth and fifth century, though, it is necessary to clearly document the most important legal gains of the period. It is this which we will now examine.

VIII. EGALITARIAN LAWS ON WOMEN

Generally, it can be said about the laws dealing with women thus far examined that their effect on the status of women was ambiguous. Although some laws led to a greater consideration of women, some gave women very little consideration. Although some ensured greater freedom to women in their daily lives and affairs, some restricted their activities to a greater degree. Certainly the status of women changed greatly in the fourth and fifth centuries, but some of these changes were to women's advantage, some to their disadvantage.[406]

In the following laws, there is no such ambiguity. These laws are revolutionary in that their effect was the promotion of a greater equality between women and men.[407]

The first point of change was in the *tutela perpetua mulierum*. Although Roman women had originally to be supervised for their entire lives, the Theodosian Code gives evidence of a new equality of women with men, by which the *tutela* ended for both sexes at adulthood.[408] Constantine

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[406]Contrast this with Seltman (*Women in Antiquity* [New York: St. Martin's Press, 1956], p. 174): "Roman history supplies a picture of women attaining gradually more and more liberty, a higher legal status, and greater power and influence."

[407]To a point. As Lerner (*Creation*, p. 217), writes: "It should be noted that when we speak of relative improvements in the status of women in a given society, this frequently means only that we are seeing improvements in the degree in which their situation affords them opportunities to exert some leverage within the system of patriarchy."

[408]Jurists as early as Gaius, in his *Institutiones* (I,190) had questioned the need for the *tutela perpetua mulierum*. (Grimal, "Femme", p. 477. See also Buckland, *Text-Book*, p. 165).

reaffirmed the *curatio* of all persons between puberty and age twenty-five (C. Th. 3.17.1).[409] He did, however, allow women to take control of their own property at age eighteen if they showed good character (C. Th. 2.17.1), thereby giving even minor women some control of their own affairs.[410] Presumably women of good character lived without *tutela* as adults. But the existence of the *tutela mulieris* is also assumed by him two years later (C. Th. 3.17.2).[411] It is not certain, however, whether this is a *tutela* for adult women (*tutela perpetua mulierum*) or merely for female minors (*tutela minorum feminarum*). Again, over half a century later in A. D. 410, emperors Valentinian II and Theodosius with Arcadius ordered that "legalized protection shall be provided for both young children and adults" (C. Th. 3.17.3), although no specific mention is made of women.[412] But by a law of Honorius and Theodosius II it is

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[409]Schultz (*Classical*, p. 196) points out the post-classical blurring of the positions of *tutor* and *curator*. (See also Buckland, *Text-Book*, p. 172; or *Idem*, *Institutions*, pp. 84-5).

[410]Minor males could only be granted this freedom after age twenty. This law recognizes the earlier physical development of women, and seems to posit a parallel mental development. Its origin might also lie in the fact that a woman married at a younger age, and so transference of ownership was needed earlier to correspond to her change in status.

[411]Constantine did use the *tutela perpetua mulierum*, although Schultz (*Classical*, pp. 180-1) dates the last use of the *tutela* to the time of Diocletian, and attributes its disappearance to Christian influence. Buckland also considers its disappearance to have occurred after Diocletian (*Text-Book*, p. 165). Elsewhere, Buckland refers to the restoration of the *tutela legitima* (abolished by Claudian) by Constantine for young girls (*Ibid.*, p. 166).

[412]Pharr, p. 78. This is the date and the law that Gaudemet gives for the last appearance of the *tutela perpetua mulierum*. The "adults" referred to in the law, however, may have been imbeciles (*furiosi*) or wasters of money (*prodigi*),

decreed that all cases dealing with male minors should deal equally with female minors. In all of these laws, the absence of any real clarity about the *tutela perpetua mulierum* leads one to suspect that it had lost all its real importance by the fourth century. Major women had taken control of their economic affairs, and so the legal incapacity of women became obsolete. In addition, another law made all contracts by adult women henceforth legal and binding (C. Th. 2.16.3), further proving the independent legal capacity of adult women.[413] The disappearance of the lifelong *tutela*ge of women was a major breakthrough in the betterment of their status in law, and in the general achievement of more legal equality with men.[414]

The *tutela* remained for children, but women gained a major victory there as well. By another law of Valentinian II and Theodosius with Arcadius, mothers were permitted to act as *tutores* for their children (C. Th. 3.17.4; N. Th. 11.1).[415] Granted, the mother must not remarry or she would

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[412](cont'd) who were also in a *tutela perpetua* (Buckland, *Text-Book*, pp. 168-9). Corbett (*Marriage*, p. 47) puts the end of the *tutela perpetua mulierum* at sometime after Diocletian but before this date.

[413]It is tempting to see the direct influence of Pulcheria in this law, since it was issued in the same year that she was elevated to the rank of *augusta* (414; Holum, *Empresses*, p. 97). If so, it again shows a woman helping to create laws for women.

[414]Although some influential widows may have had this freedom before, for example Antonia Minor in the first century A. D., the extension of these rights to all women is the revolutionary change. Compare Troplong (*Influence*, p. 301): "Voilà, si je ne me trompe, une existence toute nouvelle qui apparaît, non par quelques rares accidents, mais par une pratique journalière et constante."

[415]Gaudemet calls the *tutela* by mothers "certaine dans les usages des provinces orientales dès le IIIe siècle après

forfeit her position to her new husband,[416] and if the mother declined, only a male relative could be chosen, but the fact that the mother became the first choice as *tutor* if her children's father died, a position after all of substitute father, translates as a new understanding of male-female equality within the family.[417] Guardianship of children would pass from the father to the mother, a preference for consanguinity over gender.[418]

In the betrothal of a young woman, the equilibrium reached in the financial exchange of dowry and betrothal gifts was one of equality. The many changes to the laws on breach of promise by the death of one of the fiancés have been documented.[419] By a law of Gratian, Valentinian II, and Theodosius, all inequalities were removed, and the return of any betrothal gifts at the death of either party was

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[415](cont'd) J.-C." (*Droit*, p. 40). Jolowicz and Nicholas also call this eastern influence (*Introduction*, p. 472). Buckland (*Text-Book*, p. 151) says this occurred only in the absence of a *tutor legitimus* (although this is not in the law) or a *tutor testamentarius* (and this is logical).

[416]Gaudemet reasons that "Il était en effet à craindre qu'une mère tutrice remariée ne portat pas autant d'attention aux enfants qu'une mère veuve." ("Tendances", p. 205). But as Humbert points out, the mother who wished to act as *tutor* but later decided to remarry did not encounter any penalties (*Remariage*, p. 412. See also N. Th. 11.1).

[417]This law was enacted by Valentinian II, Theodosius, and Arcadius, when Valentinian was nineteen and greatly under the control of his mother, Justina. Dare one presume again in this case a woman drafting a law about women? The law, once passed, certainly gave Justina more legitimate authority over her son.

[418]"In 530 Justinian extended this [right] to mothers of natural children", and by a novel of the same emperor, to grandmothers (Buckland, *Text-Book*, p. 151). This recognized even more fully the rights of blood between a mother and a child.

[419]See above, page 70.

demanded (C. Th. 3.5.10).[420] And neither betrothal gifts nor dowries were liable to a tax assessment, by a law of Theodosius II and Valentinian III, who give as their reasoning a frank view of marriage:

> For it is not the best legal principle to overload marriage also with extraordinary burdens, since it is overwhelmed by so many and so great difficulties of its own. (N. Th. 22.2)[421]

As a young woman entered marriage, therefore, financial and personal equality was much more assured to her. We have seen that by a law of Gratian, Valentinian II, and Theodosius a woman was required to preserve her nuptial and betrothal gifts intact for her children (C. Th. 3.8.2). By a novel of Theodosius II, husbands were newly required to do the same with their wives' dowries (N. Th. 14.1). Both husband and wife, then, were equally bound in the common restrictions on alienation of these assets. Much more significantly, a novel of Valentinian III established a new rule for amounts of dowries and betrothal gifts:

> The party of the wife shall give as much as the husband conferred as betrothal gifts, so that *there shall be an equal condition* for the giver and receiver. (N. Val. 35.1) my emphasis[422]

By this law, the very nature of the original dowry from Roman antiquity is completely destroyed in favour of the new

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[420]Betrothal gifts were variously called in the Theodosian Code *sponsalicia largitas*, *dona nuptialia*, *dona sponsalicia*, as well as *donatio ante nuptias*. Justinian called them always *donatio propter nuptias*. Note that this law is assumed to belong to the Theodosian Code: its text is supplied from Justinian's Code and from various barbarian codes (Pharr, p. 68, n. 30).

[421]*Ibid.*, p. 509.

[422]*Ibid.*, p. 546.

equal nature of marriage.[423] As further proof, the ideas are restated in a novel of Majorian:

> ...an equal condition on both sides should bind a man and a woman who are to be joined in a nuptial union, that is, the future wife shall know that she shall never pay under title of dowry less than she obtained as a betrothal gift. (N. Maj. 6.1)[424]

This legislation promoted the idea of a marriage as a more equal exchange, since by requiring equal stakes in the marriage by both parties, the material joining of families in a very material sense was more balanced than ever before.[425]

The existence of, and partial acceptance of private marriages attests to a personal liberation of women within marriage, and testifies to the growth in the importance of female consent to marriage. That is, by marrying a man without formal ceremony, a woman stood a better chance of

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[423]According to Herlihy, these laws prevented inflation from raising the amount of the *donatio ante nuptias* above that of the dowry. He believes that with a (dubious) high rate of infanticide of females, and the laws requiring bachelors to marry in the early empire, females gradually became a rarer commodity, and men were willing to pay more dearly for them. This turnabout in events is proved, in his estimation, by the contemporary drop in the age of marriage for men, and the rise in that of women. The situation was only further aggravated by the number of female virgins (*Households*, pp. 16-22). Although this theory does contain flaws, it still merits some consideration.

[424]Pharr, p. 556.

[425]Jolowicz and Nicholas attribute this to Greek and Christian influences (*Introduction*, p. 472). Herlihy suggests that this is why marriages without dowries were invalidated, to prevent an unequal flow of resources between families (*Households*, p. 16). I was unable to read a recently published book which may have shed further light on this subject, namely *The Marriage Bargain: Women and Dowries in European History*, by Marion A. Kaplan (New York: Haworth Press, 1985).

enforcing her choice of husband over that of her family.[426] One law of A. D. 371 orders a widowed woman under twenty-five not to contradict her relatives' choice of husband unless she is able to find fault with the man (C. Th. 3.7.1).[427] Another law of A. D. 380 from the Code seems to assume that the father's consent to marriage is sufficient (C. Th. 3.5.11).[428] Gradually, however, it seems that consent by the woman was considered as important.[429] The idea of a private, consensual marriage was a late one, but its existence in law is extraordinary. The proponents of private marriages were Theodosius II and Valentinian III, who decreed that a marriage without formalities, even a dowry or betrothal gifts, was valid if contracted between persons eligible to marry and with their consent. The knowledge of their friends was considered as sufficient proof (C. Th. 3.7.3).[430] These same emperors also made even

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[426]The continued necessity for a dowry may bely this. That is, the woman would most likely need her father's permission to receive his money.

[427]This law shows some legal expertise, since it states that consideration would be given to the fact that the woman's father or close relatives are her natural heirs, which may influence their choice of mate for her.

[428]This is the opinion of Corbett (*Marriage*, pp. 2-3). By way of example, St. Melania the Younger was "very forcibly united in marriage" by her father, in spite of her desire to live chastely (Gerontius, *Melania*, p. 27).

[429]Susan Treggiari ("Consent to Marriage", pp. 40-1) claims that by a law of Julian, the father's assent to any marriage was assumed unless proven otherwise.

[430]Corbett (*Marriage*, pp. 94-5) recognizes the revolutionary aspects of this law in regard to female consent. He writes: "serious doubt is entertained in some quarters whether the consent of a *filia* to her own marriage was really required before the fifth century." (*Ibid.*, p. 55). Was there any link between this law and the personal experience of Galla Placidia, mother of Valentinian III, who had married a

informal commitments to give dowries binding (C. Th. 3.13.4), creating the same effect of making marriage easier. Later, these two emperors also ordered that "legal marriages can be contracted by consent of the parties" (N. Th. 12.1).[431] The combined effect of the loosening of restrictions to marriage and the decline of *patria potestas* was to facilitate greater potential female participation in marriage. Certainly mutual consent was all that was needed for a private marriage without dowry or other gifts. By insisting upon consent as the basis of a legal marriage, these laws gave greater recognition to the rights of women and allowed their greater independence from their families.[432]

Finally, equality for women was partially achieved by the universalization of the *ius liberorum*, a monumental change which also occurred in this period. The real existence of *ius liberorum* in matters of inheritance is attested to by a law of Constantine (C. Th. 5.1.1); by one of Valentinian and Valens (C. Th. 5.1.2), and by two of Gratian, Valentianian II, and Theodosius (C. Th. 9.42.8; 9.42.9).[433] Its downfall was in its liberal use by emperors

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[430](cont'd) Gothic King? Or perhaps on Justa Grata Honoria, Valentinian's sister, who first had an affair with a palace steward, then allegedly offered to marry Attila the Hun (see J. B. Bury, "Justa Grata Honoria", *Journal of Roman Studies* IX [1919], 1-13).

[431]Pharr, p. 498.

[432]According to Corbett (*Marriage*, p. 96) the legislators also made any sexual relationship between a man and a woman legally a marriage unless specifically stated as concubinage.

[433]The *ius liberorum* also existed for men. See C. Th. 12.1.55 and 12.17.1.

for rewarding loyal subjects for activites other than childbearing, also, surely because of its discrepancy with the new ideological position of women. For Arcadius and Honorius extended its benefits to any childless couples who requested it from the imperial throne (C. Th. 8.17.1).[434] Later, Honorius with Theodosius II formulated the final abolition thus:

> No person hereafter shall petition Us for the special rights that accrue to parents on account of their children [the *ius liberorum*], for We bestow this privilege upon all alike by this law. (C. Th. 8.17.3)[435]

As proof of its claims, a law of Theodosius II and Valentinian III serving as a revision of C. Th. 5.1.1 (above) shows no difference in inheritance rights of women because of *ius liberorum* (C. Th. 5.1.7). This marks another victory in Roman law for women as individuals instead of as bearers of children.

The period of the fourth and fifth centuries in Roman law are significant for the dramatic changes in the legal status of women. By the dissolution of the *tutela perpetua mulierum*, the male monopoly as *tutor*, the unequal financial sacrifice of a dowry, and the *ius liberorum*, the Christian legislators in effect abolished the classical (and pre-classical) legal notion of womanhood.[436] The woman as a

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[434]The text states: "miseris sufficiat desperatio liberorum". Did this just apply to married couples without children, or to all persons without children, married and unmarried alike?

[435]Pharr, p. 218.

[436]See Buckland (*Text-Book*, p. 173; or *Idem*, *Institutions*, p. 87) for a discussion of the development of *persona* as a legal and philosophical term.

legal entity was unrecognizable in the Christian era from what she had been in the classical era. Although in public affairs much of her existence remained at a level below that of her male counterpart, these changes in her personal existence justify the use of the word "liberation" to describe her legal life.

IX. CONCLUSION

The changes occurring in Roman society in the fourth and especially the fifth century, in particular the gradual collapse of government and the conversion to Christianity, gave women of this time the opportunity to increase their status, both economically and socially. This the Theodosian Code makes clear. Moreover, none of the other sources from the period seem to contradict this. Thus the hypothesis of the connection between women's status and social disruption holds true when used to examine the period of the decline fo the Roman empire.

These changes in status were not the result of manipulation by the Christian emperors. Rather, women's position was influenced by economic, social, and ideological factors beyond the control of any individual. The laws reflect these factors much more than the imprint of any one emperor. It is true that Constantine promulgated many laws affecting the position of women, bu his ideas were in turn established for him by contemporary Christianity. Because Christian ideology is so important in the changes to the position of women, and because Constantine did provide the impetus for the acceptance of the Christian ideology by Roman society, he must be given some credit for the improvements to the status of women. [437] In general,

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[437] As Coleman (*Constantine*, p. 25) writes: "Constantine was a voluminous law-maker; fragments of nearly 300 of his laws are in existence, and we have information about others issued and now lost." Since over fifty of these 300 deal at least in part with women (see Appendix IV), this represents as much as one in six.

however, economic, social, and ideological factors influenced both the status of women and the legal decisions of the legislators, and not the reverse.

Economic factors figure significantly in the improvements in the status of women. Generally, this is a result of the financial problems in the later Roman empire arising from the labour shortage and the monetary inflation, which was in turn caused by the many military conflicts, both internal and external. Women were allowed to contribute to the easing of these burdens. In declining professions, consideration was given to the role that women played, and by putting the onus of inheritance occasionally onto women, legislators came to recognize the place of women in the continuation of these occupations, and, implicitly, their role in passing down the expertise required by the occupations.

Women also played a greater role in the general economy in this period. By allowing women to use their inheritances to fulfill the obligation missed by their fathers or husbands, legislators were forced to admit women to a role in maintaining, through these obligations, the public services of the empire. Given the extent of the responsibility placed on the shoulders of the praetors and the decurions, the admission of women to these duties meant that women became instrumental to the continuation of public services throughout the empire.

Socially, women made some great advances also in the fourth and fifth centuries. Within the family, they continued their progress toward equality as wives, and began to acquire greater liberty also as daughters. In particular, the disappearance of the *tutela perpetua mulierum*, the abolition of the *ius liberorum*, and the allowance for mothers to act as *tutores* figure prominently in this progress. Family life for women must have differed sharply from the early fourth century to the late fifth century, as legislator after legislator advanced the position of women within the family. Outside the family, however, women's position remained much the same as it had always been in Roman society. Public positions of authority, because of this, may perhaps be seen as the last bastion of exclusionism by males, which, in spite of the collapse of much of society's previous norms, remained firm. This is not too surprising, and can be witnessed in many societies, including our own. [438]

I have tried to underscore the importance of Christian belief on the ideological position of women. The contemporary emphasis of Christian leaders on virginity and chastity, within the general emphasis on individualism, offered women complete freedom from their traditional roles within the family. [439] The large number of women willing to

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[438]It should be noted that women did not suffer any decrease in status in this area.

[439]Rosemary Ruether summarizes: "the ascetic way was one of the most interesting options open to women in the fourth and fifth centuries. It offered women possibilities which departed dramatically from their traditional role

accept this exchange bears witness to the desirability of these effects. Women, despite the rigours of the ascetic life of the time, and the obligation for a greater submission by these on a spiritual plane to their god, still apparently took advantage of the new freedom from marriage in greater and greater numbers.[440] This necessitated, among other things, the creation of formal monastic orders for women. They faced their god, and their society, as individuals.

Some authors have claimed that the Christian prohibition of divorce and of remarriage largely restricted women, and this is to some extent, true. [441] Other authors, however, have rejected the traditional image of free-wheeling divorcées created by some for the previous period. [442] Also, guarantees cannot be made as to the effectiveness of these restrictive laws, and, as indicated, other laws suggest that they were not effective. Moreover,

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[439](cont'd) definitions under patriarchy. As ascetics, they could successfully combat demands for unwelcome marriage alliances. They could turn instead to intense study, self-development and an independent life in female-run communities. They were assured of absolute equality with men on the plane of their spiritual kingdom.

"Women paid for this exodus with the sacrifice of worldly pleasures, sex and childbearing, but men were paying these same prices." ("Mothers of the Church: Ascetic Women in the Late Patristic Age" in *Women of Spirit*, ed. by R. Ruether and A. McLaughlin [New York: Simon and Schuster, 1979], p. 93).

[440]The popularity of the ascetic life with the men of the period must also be mentioned.

[441]According to Fau, the status of Roman women reached its zenith in the first century with the zenith of the empire, and declined with the empire's decline (*L'émancipation*, p. 198).

[442]On this point see McNamara, "Wives and Widows", pp. 581, 583-4.

even if these decrees were effective, the restriction is more than counterbalanced by the Christian emphasis on mutual consent to marriage and the ensuing emergence of private marriages. [443]

In practice, a Christian woman of the later Roman empire, if she could not morally divorce her husband or remarry a man of her choice, could now refuse to marry the man her father had chosen for her, or declare herself married to the man she loved. She might also reject marriage altogether in favour of perpetual virginity.[444] The continuing discrepancy in the ages of men and women at marriage, combined with the numbers of military conflicts, meant she could in the last resort look forward to her years as a widow, and we have the testimony of disapproving men that women often did take advantage of the freedom provided

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[443] In "Misogynism", Ruether claims that Christian theorists "not only did not lift up the position of women beyond what it had been in antiquity but even fell below those legal rights to personal and economic autonomy which the married woman had been winning in late antique society. Thus the frequent claim that Christianity elevated the position of women must be denied. It actually lowered the position of women compared to more enlightened legislation" (p. 165). Contrast, however, this with her later comments in note 3, above, and with those of McNamara ("Wives and Widows", p. 582) who claims the following in regard to the influence of Christianity on the freedom of women: "It is my contention here that the most powerful solvent in this system was the Christian attitude toward marriage and toward the consequent relationship of two individuals."

[444] As writes McNamara: "At the very least, the virgin woman could expect release from the governance of a husband and the chains of children." ("Sexual Equality", p. 151). Similarly, Yarbrough adds: "The rise of asceticism provided the aristocratic woman with an increasingly acceptable alternative to marriage. She might either remain a virgin or, after the death of her husband, remain a widow." ("Christianization", p. 162).

by widowhood.[445]

But the Roman empire was not to outlive its crisis, at least in the west: women might not have had much opportunity to enjoy their greater freedom. The Dark Ages which followed, however, provided more opportunities for women's continued freedom.[446] In the Byzantine empire in the east, women's position is much less clear, but this is due more to the *lacunae* of historians than of documentary evidence. It is hoped the subject will receive greater coverage.

The knowledge that women of the fourth and fifth centuries improved their position will be of use to historians of the period. Perhaps the social tensions generated by this change contributed to the malaise usually described for this period. Or perhaps the greater responsibilities given to women allowed men more freedom to attend to the empire's immediate concerns, and thus women were able to help extend the life of the empire in the west, and contributed to the continuation of the empire in the east. Or to those who see the downfall of the empire in its conversion to Christianity, perhaps the enthusiasm with which women embraced its beliefs, hastened the empire's collapse. The status of women must now be re-examined in the larger framework of the period, but this must be the task of another.

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[445]See above, page 135.
[446]This forms the basis of Suzanne Wempel's *Women in Frankish Society*.

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APPENDIX I

ROMAN EMPERORS: DIOCLETIAN TO LEO[447]

West	East
Maximian C. 285-86 A. 286-305, 307-10	Diocletian A. 284-305
Constantius I C. 293-305 A. 305-06	Galerius C. 293-305 A. 305-11
Constantine C. 306-08 A. 308-37	Maximian C. 305-08 A. 308-13
Severus A. 306-07	
Maxentius A. 307-12	Licinius A. 308
(Alexander A. 308-11)	Licinianus C. 317-23
Crispus C. 317-25	Martinianus C. 324
	Constantine A. 324-37[448]
Constantine II C. 317-37 A. 337-40	Constantius II C. 324-37 A. 337-61[449]
Constans C. 333-37 A. 337-50	
Dalmatius C. 335-37	
(Magnentius A. 350-3)	Gallus C. 350-54
(Vetranio A. 350)	
(Nepotianus A. 350)	
Constantius II A. 351-61	
Julian C. 355-60 A. 360-63[450]	Julian A. 361-63
Jovian A. 363-64[451]	Jovian A. 363-64
	Valentinian I A. 364-75
	Valens A. 364-7
(Firmus, 372)	(Procopius A. 365)
Gratian A. 375-83	
Maximus A. 383-87	Theodosius I A. 379-9[452]
Valentinian II A. 383-92	
(Eugenius A. 392-94)	
Theodosius I A. 394-95	
Honorius A. 395-423	Arcadius A. 395-408
(Gildo, 397)	
(Constantine A. 407-11)	Theodosius II A. 408-50

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[447] A. = Augustus: C. = Caesar. Names in brackets = usurpers. The dates of the Augusti are those of their independent rule, and do not include the years when they merely bore the title or ruled as viceregents. Many of the earlier emperors (down to 395) ruled only parts of the West or the East.

[448] Constantine was ruler of the whole empire (with his sons as Caesars of different areas) 324-37.

[449] Constantius II was ruler of the whole empire 351-60 (with Gallus and Julian Caesars of certain areas).

[450] Julian was sole emperor 361-63.

[451] Jovian was sole emperor 363-64.

[452] Theodosius I was de facto ruler of the whole empire 388-94 and sole emperor 394-95.

(Constans C. 408-10)
(Attalus A. 408-10)
(Jovinus A. 412-13)
Constantius III A. 421
(John A. 423-25)
Valentinian III A. 425-55 Marcian A. 450-57
Petronius Maximus A. 455
Avitus A. 455-56
Majorian A. 457-61
Leo I A. 457-74
Libius Severus A. 461-65
Anthemius A. 467-72

Note: Taken from Jones, *Decline*, pp. 372-4 (Appendix II).

APPENDIX II

THE LATER ROMAN EMPERORS AND THEIR LAWS ON WOMEN

Emperor	Law	Date	Page
Constantine	C. Th. 4.12.1	314	89
	C. Th. 8.18.1	315 (or 319)[453]	79, 82, 83
	C. Th. 11.1.1	315 (or 360)	66
	C. Th. 11.27.1	315 (or 329)	102
	C. Th. 11.36.1	315(314)	128
	C. Th. 1.22.1	316	123
	C. Th. 5.1.1	317 (or 319 or 321)	156
	C. Th. 9.1.1	317	144
	C. Th. 10.11.1	317	111
	C. Th. 3.17.1	318 (or 319)	150
	C. Th. 12.1.6	318 (or 319	60
	C. Th. 2.19.1	319	113
	C. Th. 3.5.2	319	69, 70
	C. Th. 5.10.1	319 (or 329)	102
	C. Th. 8.12.4	319	72
	C. Th. 8.18.2	319	79, 83
	C. Th. 9.15.1	319	125
	C. Th. 9.21.1	319 (or 323 or 325)	123
	C. Th. 4.12.3	320 (or 326)	90
	C. Th. 8.16.1	320	132
	C. Th. 9.24.1	320	145, 146
	C. Th. 9.21.4	320 (or 326)	136
	C. Th. 13.3.2	320 (or 326 or 354)	66
	C. Th. 2.17.1	321 (or 324)	150
	C. Th. 2.19.2	321	113
	C. Th. 9.42.1	321	73
	C. Th. 4.8.4	322	92
	C. Th. 9.1.3	322	94
	C. Th. 9.38.1	322	129
	C. Th. 11.27.2	322	102
	C. Th. 12.17.1	324	156
	C. Th. 2.25.1	325 (or 334)	105
	C. Th. 7.20.4	325	57
	C. Th. 3.17.2	326	150
	C. Th. 9.7.1	326	130
	C. Th. 9.7.2	326	130
	C. Th. 9.8.1	326	126
	C. Th. 9.9.1	326 (or 329)	91
	C. Th. 2.24.2	327	79
	C. Th. 3.5.3	330	71, 124

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[453] "Unfortunately many of the laws [in the Theodosian Code from Constantine's reign] cannot be securely dated." (Jones, *Empire*, p. 78).

	C. Th. 3.16.1	331		106
	C. Th. 4.8.7	331		92
	C. Th. 4.12.4(5)	331		90
	C. Th. 5.9.1	331		102
	C. Th. 3.5.4	332		123
	C. Th. 3.5.5	332		123
	C. Th. 8.12.5	333		72
	C. Th. 13.3.3	333		65, 66
	C. Th. 1.22.2	334		136
	C. Th. 8.18.3	334		79, 121
	C. Th. 13.4.1	334		57
	C. Th. 13.5.7	334		111
	C. Th. 3.5.6	335	(or 336)	70
	C. Th. 4.6.2	336		116, 117
	C. Th. 4.6.3	336		116, 142
Constantius	C. Th. 8.18.4	339		81
Constantius and Constans	C. Th. 11.36.4	339		128, 129
Constantius	C. Th. 16.8.6	339		146
	C. Th. 9.3.3	340		123
Constantius and Constans	C. Th. 8.12.6	341		72
	C. Th. 3.12.1	342		126
Constantius	C. Th. 15.8.1	343		141
	C. Th. 3.5.7	345		71
Constantius and Constans	C. Th. 16.2.10	346	(or 353 or 320)	139
	C. Th. 11.36.7	348		128
	C. Th. 3.13.1	349		130
	C. Th. 7.1.3	349		105
	C. Th. 8.13.1	349		120, 125
	C. Th. 8.13.2	349		125
	C. Th. 9.24.2	349		144
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Constantius and Constans	C. Th. 9.25.1	354		133, 136, 144
	C. Th. 3.12.2	355		126
	C. Th. 8.12.7	355		72
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Constantius and Julian	C. Th. 9.42.2	356		73
	C. Th. 16.2.14	356	(or 357)	139
Constantius	C. Th. 2.1.3	357		144
Constantius and Julian	C. Th. 2.21.2	357		121
Constantius	C. Th. 2.21.1	358		81
	C. Th. 9.42.4	358		73

Constantius and Constans	C. Th. 8.13.4	358		120, 125
Constantius	C. Th. 6.4.16	359		83
Julian	C. Th. 3.1.3	362		125
	C. Th. 4.12.5(6)	362		90
	C. Th. 3.5.8	363		68
	C. Th. 3.13.2	363		88
	C. Th. 12.1.55	363		156
	C. Th. 9.42.6	364		73
Jovian	C. Th. 9.25.2	364		133, 136
Valentinian and Valens	C. Th. 10.20.3	365		90
Valentinian, Valens, and Gratian	C. Th. 4.12.6(7)	366		90
	C. Th. 8.14.1	367		125
	C. Th. 9.38.3	367	(or 369)	145
	C. Th. 15.7.1	367	(or 371)	143
	C. Th. 9.38.4	368	(or 370)	129, 145
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	C. Th. 5.1.2	368	(or 369)	156
	C. Th. 13.10.4	368	(or 370)	133, 136
	C. Th. 13.5.12	369		64, 110
	C. Th. 6.4.17	370		65
	C. Th. 7.13.6	370		57
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	C. Th. 16.2.20	370		113, 136
	C. Th. 3.7.1	371		125, 155
	C. Th. 4.6.4	371		117
	C. Th. 12.1.74	371		92
	C. Th. 10.20.5	371		58
	C. Th. 15.7.2	371		141
	C. Th. 14.3.14	372		58
	C. Th. 9.14.1	374		103
	C. Th. 9.24.3	374		145
	C. Th. 13.4.4	374		66
	C. Th. 7.13.7	375		57
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	C. Th. 3.6.1	380		124
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	C. Th. 9.42.8	380		74, 156
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	C. Th. 9.7.5	388		146
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	C. Th. 3.17.4	390		120, 156
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	C. Th. 4.12.7(8)	398		91
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